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and

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 24

(T.D. 97–45)

RIN 1515–AA57

UPDATE OF PORTS SUBJECT TO THE HARBOR MAINTENANCE FEE; CORRECTIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; corrections.

SUMMARY: This document corrects an omission that was made in the interim regulations document published in the Federal Register on June 4, 1997, which updated the list of ports that process commercial vessels that transport cargo that are subject to the Water Resources Development Act of 1986.

DATES: This correction is effective October 3, 1997.

FOR FURTHER INFORMATION CONTACT: Patricia Barbare, Office of Finance, (202) 927–0034.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 4, 1997, Customs published in the Federal Register (62 FR 30448) interim regulations (T.D. 97–45) which amended § 24.24 of the Customs Regulations (19 CFR 24.24) to update the list of ports that process commercial vessels that transport cargo that are subject to the Water Resources Development Act of 1986. A correction document to these interim regulations was published in the Federal Register (62 FR 45156) on August 26, 1997. Since then, it has come to Customs attention that the June 4 document contains another error. The interim rule document failed to list under the Galveston Bay Ports the ports of Galveston and Texas City and their port codes: 5310 and 5306, respectively. Accordingly, this document corrects that omission.

CORRECTIONS TO PUBLICATION

The document (FR Doc. 97–14409) published in the Federal Register (62 FR 30448) on June 4, 1997, is corrected as follows:

1. On page 30453, under the heading for "Texas", in the fourth line, the listing "Galveston Bay Ports*" should read as follows:

Port code, port name and state	*Port descriptions and notations*
* * *	* * * *
Texas	
* * *	* * * *
Galveston Bay Ports*	Includes Port Bolivar and all points on Galveston Bay in Galveston County. Movements between points within this area are intraport.
5310—Galveston	
5306—Texas City	
* * *	* * * *

Date: September 29, 1997.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, October 3, 1997 (62 FR 51774)]

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19 CFR Part 12

(T.D. 97–81)

RIN 1515–AC24

IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL ARTIFACTS FROM GUATEMALA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of import restrictions on pre-Columbian culturally significant archaeological artifacts of Maya material from the Peten Lowlands, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala. These restrictions are being imposed pursuant to an agreement between the United States and Guatemala that has been entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The document also contains the Designated List of Archaeological Material that describes the articles to which the restrictions apply. These import

restrictions imposed pursuant to the bilateral agreement between the United States and Guatemala continue the import restrictions that were imposed on an emergency basis in 1991. Accordingly, this document amends the Customs Regulations by removing Guatemala from the listing of countries for which emergency actions imposed the import restrictions and adding Guatemala to the list of countries for which an agreement has been entered into for imposing import restrictions.

EFFECTIVE DATE: October 3, 1997.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Donnette Rimmer, Intellectual Property Rights Branch (202) 482–6960; (Operational Aspects) Joan E. Sebenaler, Trade Operations (202) 927–0402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.*) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. The U.S. is, to date, the only major art importing country to implement the 1970 Convention.

During the past several years, import restrictions have been imposed on an emergency basis on archaeological and ethnological artifacts of a number of signatory nations as a result of requests for protection re-

ceived from those nations as well as pursuant to bilateral agreements between the United States and other countries.

Guatemala has been one of the countries whose archaeological material has been afforded emergency protection. In T.D. 91–34, § 12.104g(b), Customs Regulations, (19 CFR § 12.104g(b)) was amended to reflect that archaeological material from the Peten Archaeological Region of Guatemala received import protection under the emergency protection provisions of the Act.

Import restrictions are now being imposed on archaeological artifacts of Maya material from the Peten Lowlands, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala as the result of a bilateral agreement entered into between the United States and Guatemala. This agreement was entered into on September 29, 1997, pursuant to the provisions of 19 U.S.C. 2602. Protection of the archaeological material of Maya material from the Peten Lowlands, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala previously reflected in § 12.104g(b) will be continued through the bilateral agreement without interruption. Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and Guatemala and the emergency import restrictions on certain archaeological material from Guatemala is being removed from § 12.104g(b) as those restrictions are now encompassed in § 12.104g(a).

Material And Sites Encompassed In Import Restrictions

In reaching the decision to recommend that negotiations for an agreement with Guatemala should be undertaken to continue the imposition of import restrictions on certain archaeological material from the Peten Lowlands, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala, the Deputy Director of the United States Information Agency made a determination that the cultural patrimony of Guatemala continues to be in jeopardy from pillage of irreplaceable materials representing Guatemala heritage and that the pillage is endemic and substantially documented with respect to Maya material from sites in the Peten Lowlands of Guatemala, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala. The Deputy Director listed the following archaeological material as those that are in need of protection:

Material: Archaeological material from sites in the Peten Lowlands of Guatemala, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala. This archaeological material includes, but is not limited to: ceramic vessels and forms; jade or green stone, possibly with traces of red pigment; shell; and bone.

These import restrictions are in addition to similar restrictions imposed by the 1972 Pre-Columbian Monumental or Architectural Sculpture or Murals Statute (19 U.S.C 2091–2095), which has denied entry

into the United States of segments of pre-Columbian monuments and stelae since May 2, 1973.

DESIGNATED LIST

The bilateral agreement between Guatemala and the United States covers the material set forth in a Designated List of Archaeological Material from sites in the Peten Lowlands of Guatemala, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala, which is set forth below. Importation of articles on this list is restricted unless the articles are accompanied by documentation certifying that the material left Guatemala legally and not in violation of the export laws of Guatemala.

ARCHAEOLOGICAL MATERIAL FROM SITES IN THE PETEN LOWLANDS OF GUATEMALA, AND RELATED PRE-COLUMBIAN MATERIAL FROM THE HIGHLANDS AND THE SOUTHERN COAST OF GUATEMALA

The following categories of material are restricted from importation into the U.S. unless accompanied by a verifiable export certificate issued by the Government of Guatemala—archaeological material from sites in the Peten Lowlands of Guatemala, and related pre-Columbian material from the Highlands and the Southern Coast of Guatemala, that includes, but is not limited to, the categories listed below. As this region is further excavated, other types of material may be found and added to an amended list. The following list is representative only. Any dimensions are approximate.

CHRONOLOGICAL TABLE

Stage	*Substage*	*Dates*
Preclassic Stage	Early Preclassic	2000/1500 B.C.—600 B.C.
	Preclassic	600 B.C.—400 B.C.
	Late Preclassic	400 B.C.—250 A.D.
Classic Stage	Early Classic	250 A.D.—550 A.D
	Late Classic	550 A.D.—900 A.D.
Postclassic Stage	Early Postclassic	900 A.D.—1250 A.D.
	Late Postclassic	1250 A.D.—1524 A.D.

DESIGNATED LIST OF MATERIALS

I. Ceramic/Terracotta/Fired Clay—A wide variety of decorative techniques are used on all shapes: fluting, gouged or incised lines and designs, modeled carving, and painted polychrome or bichrome designs of human or animal figures, mythological scenes or geometric motifs. Small pieces of clay modeled into knobs, curls, faces, etc., are often applied to the vessels. Bowls and dishes may have lids or tripod feet.

A. Common Vessels.

1. Vases—(10–25 cm ht).
2. Bowls—(8–15 cm ht).
3. Dishes and plates—(27–62 cm diam).
4. Jars—(12.5–50 cm ht).

B. Special Forms.

1. Drums—polychrome painted and plain (35–75 cm ht).
2. Figurines—human and animal form (6–15 cm ht).
3. Whistles—human and animal form (5–10 cm ht).
4. Rattles—human and animal form (5–7 cm ht).
5. Miniature vessels—(5–10 cm ht).
6. Stamps and seals—engraved geometric design, various sizes and shapes.
7. Effigy vessels—in human or animal form (16–30 cm ht).
8. Incense burners—elaborate painted, applied and modeled decoration in form of human figures (25–50 cm ht).

II. Stone (jade, obsidian, flint, alabaster/calcite, limestone, slate, and other)

A. Figurines—human and animal (7–25 cm ht).

B. Masks—incised decoration and inlaid with shell, human and animal faces (20–25 cm length).

C. Jewelry—various shapes and sizes.

1. Pendants.
2. Earplugs.
3. Necklaces.

D. Stelae, Ritual Objects, Architectural Elements—Carved in low relief with scenes of war, ritual or political events, portraits of rulers or nobles, often inscribed with glyphic texts. Sometimes covered with stucco and painted. The size of stelae and architectural elements such as lintels, posts, steps, decorative building blocks range from .5 meters to 2.5 meters in height. Hachas (thin, carved human or animal heads in the shape of an axe), yokes, and other carved ritual objects are under 1 meter in length or height, but vary in size.

E. Tools and Weapons.

1. Arrowheads (3–7 cm length).
2. Axes, adzes, celts (3–16 cm length).
3. Blades (4–15 cm length).
4. Chisels (20–30 cm length).
5. Spearpoints (3–10 cm length).
6. Eccentric shapes (10–15 cm length).
7. Grindingstones (30–50 cm length).

F. Vessels and Containers.

1. Bowls (10–25 cm ht).
2. Plates/Dishes (15–40 cm diam).
3. Vases (6–23 cm ht).

III. Metal (gold, silver, or other)—Cast or beaten into the desired form, decorated with engraving, inlay, punctured design or attachments. Often in human or stylized animal forms.

A. Jewelry—various shapes and sizes.

1. Necklaces.
2. Bracelets.
3. Disks.

4. Earrings or earplugs.
5. Pendants.

B. Figurines—(5–10 cm ht).
C. Masks—(15–25 cm length)

IV. Shell—Decorated with cinnabar and incised lines, sometimes with jade applied.

A. Figurines—human and animal (2–5 cm ht).
B. Jewelry—various shapes and sizes.
1. Necklaces.
2. Bracelets.
3. Disks.
4. Earrings or earplugs.
5. Pendants.

C. Natural Forms—often with incised designs, various shapes and sizes.

V. Animal Bone—Carved or incised with geometric and animal designs and glyphs.

A. Tools—various sizes.
1. Needles.
2. Scrapers.

B. Jewelry—various shapes and sizes.
1. Pendants.
2. Beads.
3. Earplugs.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendment to the Customs Regulations contained in this document imposing import restrictions on the above-listed Guatemalan cultural property is being made in response to a bilateral agreement entered into in furtherance of the foreign affairs interests of the United States, pursuant to section 553(a)(1) of the Administrative Procedure Act, (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)* do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Keith B. Rudich, Esq., Regulations Branch, Office of Regulations and Rulings, U.S. Customs

Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general authority and specific authority citation for Part 12, in part, continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * * * *

2. In § 12.104g, paragraph (a) the list of agreements imposing import restrictions on described articles of cultural property of State Parties is amended by adding Guatemala in appropriate alphabetical order as follows:

State	*Cultural Property*	*T.D. No.*
* * *	* * * *	*
Guatemala	Archaeological Material From Sites In The Peten Lowlands Of Guatemala, And Related Pre-Columbian Material From The Highlands And The Southern Coast of Guatemala	T.D. 97–81
* * *	* * * *	*

3. In § 12.104(g), paragraph (b), the list of emergency actions imposing import restrictions on described articles of cultural property of State parties is amended by removing the entry for "Guatemala" in its entirety.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: September 24, 1997.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1997 (62 FR 51771)]

19 CFR Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133, 141, 143, 148, 151, 152, 159, 171, 177, and 191

(T.D. 97–82)

TECHNICAL AMENDMENTS TO THE CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document makes various minor technical changes and corrections to the Customs Regulations, in accordance with the Customs policy of periodically reviewing its regulations to ensure that they are current.

EFFECTIVE DATE: October 3, 1997.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Regulations Branch, Office of Regulations and Rulings (202–927–2333).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The technical amendments set forth in this document involve Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133, 141, 143, 148, 151, 152, 159, 171, 177 and 191 of the Customs Regulations (19 CFR Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133, 141, 143, 148, 151, 152, 159, 171, 177 and 191) and are summarized below.

DISCUSSION OF CHANGES

Part 4

1. In the table set forth under § 4.20(c), in the column headed "Light money", the second figure (".05") is corrected to read ".50".

2. At the end of § 4.80(a)(3), the reference to "46 CFR subpart 67.03" is corrected to read "46 CFR 67.3".

Part 10

1. In the third sentence of § 10.1(i), the reference to "§ 142.11(b)" is corrected to read "§ 141.11(b)".

2. In the last sentence of § 10.7(d), the reference to "§ 10.6(c)" is corrected to reflect that present § 10.6 (which corresponds in substance to former § 10.6(c)) is not subdivided.

3. In the second sentence of § 10.11(b), the reference to "item 807.00" is replaced by the appropriate Harmonized Tariff Schedule of the United States (HTSUS) reference which appears correctly in the first sentence.

4. In § 10.41b, the number "12" appearing in the first sentence of the introductory text of paragraph (b) and the number "16" appearing in

the text of paragraph (b)(7) are removed, because these numbers have no relevance in these texts. Also in § 10.41b, the reference in the introductory text of paragraph (d)(1) to "paragraph (c)(2)" is corrected to read "paragraph (d)(2)".

5. In § 10.46, the words "upon compliance with §§ 10.43–10.45, or" are removed, because §§ 10.44 and 10.45 do not exist and § 10.43 is not relevant in this context.

6. In the second sentence of § 10.63, the cross-reference to § 23.4 is removed, because no such section exists.

7. In § 10.67(c), the words "and the merchandise was identified, registered, and exported in accordance with the regulations set forth in § 10.8(e), (g), (h), and (i) governing the exportation of articles sent abroad for repairs" are removed. This change is necessary because § 10.8 was revised (among other things, to do away with the pre-exportation registration procedure) and, as so revised, no longer contains paragraphs (e), (g), (h), and (i)—see T.D. 94–47, published in the Federal Register on May 17, 1994 (59 FR 25563).

8. In § 10.75, the word "That" at the beginning of the last sentence is corrected to read "The", for purely grammatical reasons.

9. In § 10.90(a), the reference to "subheading 8524.90.20" is corrected to read "subheading 8524.99.20".

10. In the first sentence of § 10.100, the reference to § "141.83(c)(8)" is corrected to read "141.83(d)(8)".

11. In the first sentence of § 10.151, the reference "§ 101.1(o)" is changed to read "§ 101.1" and the word "or" is inserted after "declaration". The first change is necessary because the definition paragraphs in § 101.1 no longer have letter designations, and the second change is for purely grammatical reasons.

12. In the first and fifth sentences of § 10.180(a), the references to HTSUS subheadings "0201.20.20, 0201.30.20, 0202.20.20, 0202.30.20" are changed to reflect the current HTSUS subheading numbers that pertain to the products at issue.

Part 11

In the first sentence of § 11.9(b), the words "manufacturer or purchaser of" are corrected to read "manufacturer or purchaser or", to properly reflect the intent and context of the immediately following words in the regulatory text ("a duly registered trade name", which under the regulation may be used in place of the actual name of the manufacturer or purchaser).

Part 12

1. In the first sentence of § 12.29(d), the reference to "Chapter 4, Additional U.S. Note 2" is corrected to read "Chapter 4, Additional U.S. Note 26".

2. In § 12.33(e), "Department of Health, Education, and Welfare" is corrected to read "Department of Health and Human Services".

Part 18

In the first sentence of § 18.6(d), the reference to "§ 114.22(c)(3)" is corrected to read "§ 114.22(d)".

Part 24

Section 612(a) of the Uruguay Round Agreements Act (the URAA, Public Law 103–465, 108 Stat. 4809) amended the merchandise processing fee provisions of the Customs user fee statute (codified at 19 U.S.C. 58c), *inter alia*, by (1) increasing the basic ad valorem rate for formal entries and releases to "0.21" percent, (2) increasing to "$6" the fee for each informal entry or release that is manual and not prepared by Customs personnel, (3) increasing to "$9" the fee for each informal entry or release (whether automated or manual) that is prepared by Customs personnel, and (4) increasing the formal entry or release maximum and minimum fees to "$485" and "$25" respectively. Accordingly, § 24.23(b)(1)(i)(A) and (B) and (b)(2)(i)(B) and (C) are modified to reflect the current statutory fee provisions which Customs has been following since January 1, 1995, when the changes made by section 612(a) of the URAA took effect.

Part 103

In § 103.11(b)(2)(xii), the reference to "§ 114.22(a) and (b)" is changed to read "§ 114.22(a)", because paragraph (b) is in reserved status and thus contains no regulatory text.

Part 112

In § 112.26, the reference to "§ 113.26" is corrected to read "§ 113.27".

Part 122

In § 122.152, the last sentence is removed because the "subpart P" referred to therein is reserved and thus contains no regulatory text.

Part 127

In the second sentence of § 127.33, the reference to "Subchapter XV" is corrected to read "Subchapter IV".

Part 133

1. At the end of § 133.21(d), the reference within the parentheses to "§ 133.24" is corrected to read "§ 133.23a".

2. In § 133.23(b)(3), the reference within parentheses to "§ 133.24" is corrected to read "§ 133.23a".

Part 141

1. In the authority citations for Part 141, the specific authority citation for Subpart B is removed, because the statutory provision referenced therein was repealed in 1983 by section 201(c) of Public Law 97–446.

2. At the end of § 141.1(f), the reference within the parentheses to "part 20" is corrected to read "part 27".

3. In § 141.4, in the introductory text of paragraph (c), the reference to "General Note 13(e)" is corrected to read "General Note 16(e)".

4. In the first sentence of § 141.11(b), the reference to "subpart B of this chapter" is corrected to read "subpart B of part 142 of this chapter".

5. In § 141.61, in paragraph (a)(1), the parenthetical reference at the end of the second sentence to "§ 101.1(k)" is corrected to read "§ 101.1 of this chapter", because the definition paragraphs in § 101.1 no longer have letter designations. Also in § 141.61, in paragraph (e)(3), the reference to "General Statistical Note 1(b)(V)" is corrected to read "General Statistical Note 1(b)(ii)".

6. At the end of § 141.69(a), the reference to "§ 141.68(f)" is corrected to read "§ 141.68(g)".

7. In § 141.83, paragraph (d)(1) is removed, because it relates to the special Customs invoice which, along with the text of paragraph (a), has been eliminated.

8. In § 141.89(a), in the product listings for machine tools, the reference in item (4) to subheading "8457.10.0010 through 8457.10.0050" is corrected to read "8457.10.00".

9. In § 141.112(f), the reference to § "158.10" is corrected to read "158.44".

Part 143

In § 143.1(b), the reference to "§ 101.1(l)" is corrected to read "§ 101.1", because the definition paragraphs in § 101.1 no longer have letter designations.

Part 148

In § 148.41, the reference to subheading "9804.00.20" is corrected to read "9804.00.40".

Part 151

In § 151.4, paragraph (b)(2) (which refers to sampling of benzenoid chemicals) is removed, because there are no longer any special sampling procedures applicable to benzenoid chemicals. Subpart D of Part 152 of the Customs Regulations (which included the § 152.35 referred to in this paragraph (b)(2)) was removed by T.D. 87–89 (52 FR 24444) which made a number of changes to the Customs Regulations to reflect the replacement of the old value law by the new value law under the Trade Agreements Act of 1979.

Part 152

1. In the authority citations for Part 152, the specific authority citation for Subpart D is removed and the specific authority citation for §§ 152.13 and 152.24 is corrected to refer only to § 152.13, because Subpart D and § 152.24 are in reserved status and thus contain no regulatory text.

2. In § 152.102, the reference in paragraph (j)(2) to "§ 152.103(j)(2)(iv)" is corrected to read "§ 152.103(j)(2)(ii)". Also in § 152.102, the reference in paragraph (k) to "§ 151.105(c)(3)" is corrected to read "§ 152.105(c)(3)".

Part 159

1. In the first sentence of § 159.33, the reference to "31 U.S.C. 372(a)" is corrected to read "31 U.S.C. 5151(b)".

2. In the first sentence of § 159.35, the reference to "31 U.S.C. 372(c)(2)" is corrected to read "31 U.S.C. 5151(e)".

3. At the beginning of the first sentence of § 159.43, the word "Additional" is removed because it does not appear in the title of the referenced U.S. Note.

Part 171

In Appendix C to Part 171, the reference to "19 CFR 141.133" at the end of paragraph E.2. of section II is corrected to read "19 CFR 141.33".

Part 177

In § 177.2(b)(2)(iii), the reference in the first sentence to "subparts C and D of part 152" is corrected to read "subpart C of part 152", because subpart D of Part 152 is reserved and thus contains no regulatory text.

Part 191

1. At the end of § 191.91, the reference within the parentheses to "§ 191.4(a)(10)" is corrected to read "§ 191.4(a)(12)".

2. At the end of § 191.131(a), the reference within the parentheses to "§ 191.4(a)(11)" is corrected to read "§ 191.4(a)(13)".

3. In § 191.161, the words "fourth provision" are corrected to read "fourth proviso" and at the end the reference within the parentheses to "§ 191.4(a)(12)" is corrected to read "§ 191.4(a)(14)".

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Because the amendments only involve technical corrections to conform the affected texts to existing law or other regulatory provisions, notice and public procedure in this case are inapplicable and unnecessary pursuant to 5 U.S.C. 553(b)(B), and, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required. Since this document is not subject to the aforesaid requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.)*. Furthermore, these amendments do not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 4

Arrival, Bonds, Cargo vessels, Coastal zone, Coastwise trade, Common carriers, Customs duties and inspection, Declarations, Entry, Ex-

ports, Fees, Fishing vessels, Foreign commerce and trade statistics, Freight, Harbors, Imports, Inspection, Landing, Maritime carriers, Merchandise, Passenger Vessels, Repairs, Reporting and recordkeeping requirements, Seamen, Shipping, Vessels, Yachts.

19 CFR Part 10

Aircraft, Alterations, American goods, Animals, Art, Assembly, Automotive products, Bonds, Customs duties and inspection, Exports, Imports, International traffic, Packaging and containers, Preference programs, Repairs, Reporting and recordkeeping requirements, Shipments, Trade agreements, Value content, Vessels, Vehicles.

19 CFR Part 11

Customs duties and inspection, Furs, Labeling, Liquor, Marking, Packaging and containers, Precious metals, Prohibited merchandise, Reporting and recordkeeping requirements, Textiles and textile products, Tobacco products, Wool.

19 CFR Part 12

Agriculture and agricultural products, Animals, Bonds, Chemicals, Cultural property, Customs duties and inspection, Dairy products, Entry of merchandise, Imports, Labeling, Licensing, Marking, Prohibited merchandise, Restricted merchandise, Reporting and recordkeeping requirements, Seizure and forfeiture, Trade agreements, Vehicles, Vessels.

19 CFR Part 18

Bonds, Bonded transportation, Common carriers, Customs duties and inspection, Exports, Foreign trade statistics, Imports, Prohibited merchandise, Restricted merchandise, Reporting and recordkeeping requirements, Transportation, Vehicles, Vessels.

19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Fees, Financial and accounting procedures, Foreign trade statistics, Reporting and recordkeeping requirements, Taxes, Trade agreements, User fees, Wages.

19 CFR Part 103

Administrative practice and procedure, Confidential business information, Courts, Freedom of Information, Imports, Law enforcement, Privacy, Reporting and recordkeeping requirements.

19 CFR Part 112

Administrative practice and procedure, Bonds, Common carriers, Customs duties and inspection, Exports, Freight forwarders, Imports, Licensing, Motor carriers, Reporting and recordkeeping requirements.

19 CFR Part 122

Administrative practice and procedure, Air carriers, Aircraft, Airports, Air transportation, Baggage, Bonds, Cuba, Customs duties and

inspection, Foreign commerce and trade statistics, Freight, Imports, Penalties, Reporting and recordkeeping requirements, Security measures.

19 CFR Part 127

Customs duties and inspection, Exports, Reporting and recordkeeping requirements.

19 CFR Part 133

Copyrights, Customs duties and inspection, Fees assessment, Imports, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise (counterfeit goods), Seizures and forfeitures, Trademarks, Trade names, Unfair competition.

19 CFR Part 141

Bonds, Customs duties and inspection, Entry of merchandise, Foreign trade statistics, Invoices, Packaging, Powers of attorney, Release of merchandise, Reporting and recordkeeping requirements, Trademarks, Trade names.

19 CFR Part 143

Automated Broker Interface (ABI), Computer technology, Customs duties and inspection, Electronic entry filing, Entry of merchandise, Invoice requirements, Reporting and recordkeeping requirements.

19 CFR Part 148

Airmen, Aliens, Baggage, Crewmembers, Customs duties and inspection, Declarations, Foreign officials, Government employees, International organizations, Privileges and Immunities, Reporting and recordkeeping requirements, Seamen, Taxes.

19 CFR Part 151

Customs duties and inspection, Examination, Fees assessment, Imports, Laboratories, Licensing, Penalties, Reporting and recordkeeping requirements, Sampling and testing.

19 CFR Part 152

Appraisement, Classification, Customs duties and inspection, Valuation.

19 CFR Part 159

Antidumping, Computer technology, Countervailing duties, Customs duties and inspection, Discriminating duties, Entry procedures, Imports, Liquidation of entries for merchandise, Suspension of liquidation pending disposition of American manufacturer's cause of action, Value content.

19 CFR Part 171

Administrative practice and procedure, Customs duties and inspection, Law Enforcement, Penalties, Seizures and forfeitures.

19 CFR Part 177

Administrative practice and procedure, Courts, Customs duties and inspection, Government procurement, Judicial proceedings, Reporting and recordkeeping requirements, Rulings.

19 CFR Part 191

Bonds, Canada, Commerce, Customs duties and inspection, Drawback, Exports, Mexico, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133, 141, 143, 148, 151, 152, 159, 171, 177 and 191, Customs Regulations (19 CFR Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133, 141, 143, 148, 151, 152, 159, 171, 177 and 191), are amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.20 also issued under 46 U.S.C. 2107(b), 8103, 14306, 14502, 14511, 14512, 14513, 14701, 14702, 46 U.S.C. App. 121, 128;

* * * * * * *

Section 4.80 also issued under 46 U.S.C. 12106, 46 U.S.C. App. 251, 289, 319, 802, 808, 883, 883–1;

* * * * * * *

2. In § 4.20, in the table under paragraph (c), in the column headed "Light money", the figure ".05" is corrected to read ".50".

3. In § 4.80, at the end of the second sentence of paragraph (a)(3), the reference "46 CFR subpart 67.03" is corrected to read "46 CFR 67.3".

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for Part 10 and the specific authority citation for § 10.41b are revised, and the specific authority citation for § 10.63 continues to read, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * * * *

Section 10.41b also issued under 19 U.S.C. 1202 (Chapter 98, Subchapter III, U.S. Note 3, HTSUS);

* * * * * * *

Sections 10.61, 10.62, 10.63, 10.64, 10.64a also issued under 19 U.S.C. 1309;

* * * * * * *

2. In § 10.1, in the third sentence of paragraph (i), the reference "§ 142.11(b)" is corrected to read "§ 141.11(b)".

3. In § 10.7, in the second sentence of paragraph (d), the reference "§ 10.6(c)" is corrected to read "§ 10.6".

4. In § 10.11, the second sentence of paragraph (b) is amended by removing the reference "item 807.00" and adding, in its place, the reference "subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202)".

5. In § 10.41b:

a. In the introductory text of paragraph (b), in the first sentence, the number "12" is removed;

b. In paragraph (b)(7), the number "16" is removed; and

c. In the introductory text of paragraph (d)(1), the reference "paragraph (c)(2)" is corrected to read "paragraph (d)(2)".

6. In § 10.46, the words "upon compliance with §§ 10.43–10.45, or" are removed.

7. In § 10.63, the second sentence is amended by removing the reference "§§ 4.39 and 23.4" and adding, in its place, the reference "§ 4.39".

8. In § 10.67, in paragraph (c), the words "and the merchandise was identified, registered, and exported in accordance with the regulations set forth in § 10.8(e), (g), (h), and (i) governing the exportation of articles sent abroad for repairs" are removed.

9. In § 10.75, at the beginning of the second sentence, the word "That" is corrected to read "The".

10. In § 10.90, in paragraph (a), the reference "subheading 8524.90.20" is corrected to read "subheading 8524.99.20".

11. In § 10.100, in the first sentence, the reference "141.83(c)(8)" is corrected to read "141.83(d)(8)".

12. In § 10.151, in the first sentence, the reference "§ 101.1(o)" is corrected to read "§ 101.1" and the word "or" is added after "declaration".

13. In § 10.180, in the first and fifth sentences of paragraph (a), the reference "subheadings 0201.20.20, 0201.30.20, 0202.20.20, 0202.30.20" is corrected to read "subheadings 0201.20.10, 0201.30.02, 0202.20.02, 0202.20.10".

PART 11—PACKING AND STAMPING; MARKING

1. The authority citation for Part 11 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Notes 20 and 21, Harmonized Tariff Schedule of the United States), 1624.

2. In § 11.9, the first sentence of paragraph (b) is amended by removing the words "manufacturer or producer of" and adding, in their place, the words "manufacturer or producer or".

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The authority citation for Part 12 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * * * *

2. In § 12.29, in the first sentence of paragraph (d), the reference "Chapter 4, Additional U.S. Note 2" is corrected to read "Chapter 4, Additional U.S. Note 26".

3. In § 12.33, paragraph (e) is amended by removing the words "Department of Health, Education, and Welfare" and adding, in their place, the words "Department of Health and Human Services".

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The authority citation for Part 18 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1551, 1552, 1553, 1624.

* * * * * * *

2. In § 18.6, in the first sentence of paragraph (d), the reference "§ 114.22(c)(3)" is corrected to read "§ 114.22(d)".

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58a–58c, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1450, 1624; 31 U.S.C. 9701.

* * * * * * *

2. In § 24.23:

a. In paragraph (b)(1)(i)(A), in the first sentence, the figure "0.19 percent" is corrected to read "0.21 percent";

b. In paragraph (b)(1)(i)(B), the figure "$400" is corrected to read "$485" and the figure "$21" is corrected to read "$25";

c. In paragraph (b)(2)(i)(B), the figure "$5" is corrected to read "$6"; and

d. In paragraph (b)(2)(i)(C), the figure "$8" is corrected to read "$9".

PART 103—AVAILABILITY OF INFORMATION

1. The authority citation for Part 103 continues to read in part as follows:

Authority: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * * * *

2. In § 103.11, in paragraph (b)(2)(xii), the reference "§ 114.22(a) and (b)" is corrected to read "§ 114.22(a)".

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. In § 112.26, the reference "§ 113.26" is corrected to read "§ 113.27".

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. In § 122.152, the last sentence is removed.

PART 127—GENERAL ORDER, UNCLAIMED, AND ABANDONED MERCHANDISE

1. The authority citation for Part 127 continues to read as follows:

Authority: 19 U.S.C. 66, 1311, 1312, 1484, 1485, 1490, 1491, 1492, 1506, 1559, 1563, 1623, 1624, 1646a; 26 U.S.C. 7553.

2. In § 127.33, in the second sentence, the reference "Subchapter XV" is corrected to read "Subchapter IV".

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for Part 133 continues to read in part as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * * * *

Section 133.21 also issued under 15 U.S.C. 1124, 19 U.S.C. 1526;

* * * * * * *

2. In § 133.21, at the end of paragraph (d), the reference "§ 133.24" within the parentheses is corrected to read "§ 133.23a".

3. In § 133.23, in paragraph (b)(3), the reference "§ 133.24" within the parentheses is corrected to read "§ 133.23a".

PART 141—ENTRY OF MERCHANDISE

1. The authority citation for Part 141 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Subpart F also issued under 19 U.S.C. 1481;

* * * * * * *

Section 141.1 also issued under 11 U.S.C. 507(a)(7)(F), 31 U.S.C. 191, 192;

Section 141.4 also issued under 19 U.S.C. 1202 (General Note 13; Chapter 86, Additional U.S. Note 1; Chapter 89, Additional U.S. Note 1; Chapter 98, Subchapter III, U.S. Note 4; Chapter 99, Subchapter V, U.S. Note 9, Harmonized Tariff Schedule of the United States (HTSUS)), 1498;

* * * * * * *

Section 141.69 also issued under 19 U.S.C. 1315;

* * * * * * *

Section 141.112 also issued under 19 U.S.C. 1564;

* * * * * * *

2. The specific authority citation for Subpart B is removed.

3. In § 141.1, at the end of paragraph (f), the reference "part 20" within the parentheses is corrected to read "part 27".

4. In § 141.4, in the introductory text of paragraph (c), the reference "General Note 13(e)" is corrected to read "General Note 16(e)".

5. In § 141.11, in the first sentence of paragraph (b), the reference "subpart B of this chapter" is corrected to read "subpart B of part 142 of this chapter".

6. In § 141.61:

a. In paragraph (a)(1), at the end of the second sentence, the reference "§ 101.1(k)" within the parentheses is corrected to read "§ 101.1 of this chapter"; and

b. In paragraph (e)(3), the reference "General Statistical Note 1(b)(V)" is corrected to read "General Statistical Note 1(b)(ii)".

7. In § 141.69, at the end of paragraph (a), the reference "§ 141.68(f)" is corrected to read "§ 141.68(g)".

8. In § 141.83, paragraph (d)(1) is removed and reserved.

9. In § 141.89, under paragraph (a), in the product listings for machine tools, the reference in item (4) to "Subheading 8457.10.0010 through 8457.10.0050" is corrected to read "Subheading 8457.10.00".

10. In § 141.112, in paragraph (f), the reference "158.10" is corrected to read "158.44".

PART 143—SPECIAL ENTRY PROCEDURES

1. The authority citation for Part 143 continues to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. In § 143.1, in paragraph (b), the reference "§ 101.1(l)" is corrected to read "§ 101.1".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States).

* * * * * * *

2. In § 148.41, the reference "subheading 9804.00.20" is corrected to read "subheading 9804.00.40".

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The authority citation for Part 151 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 20 and 21, Harmonized Tariff Schedule of the United States (HTSUS)), 1624. Subpart A also issued under 19 U.S.C. 1499.

* * * * * * *

2. In § 151.4, paragraph (b)(2) is removed and reserved.

PART 152—CLASSIFICATION AND APPRAISEMENT OF MERCHANDISE

1. The authority citation for Part 152 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1401a, 1500, 1502, 1624.

* * * * * * *

2. The specific authority citation for Subpart D is removed.

3. The specific authority citation for §§ 152.13 and 152.24 is amended by removing the words "Sections 152.13 and 152.24" and adding, in their place, the words "Section 152.13".

4. In § 152.102:

a. In paragraph (j)(2), the reference "§ 152.103(j)(2)(iv)" is corrected to read "§ 152.103(j)(2)(ii)"; and

b. In paragraph (k), the reference "§ 151.105(c)(3)" is corrected to read "§ 152.105(c)(3)".

PART 159—LIQUIDATION OF DUTIES

1. The authority citation for Part 159 is revised to read as follows:

Authority: 19 U.S.C. 66, 1500, 1504, 1624.

Subpart C also issued under 31 U.S.C. 5151.

2. In § 159.33, in the first sentence, the reference "31 U.S.C. 372(a)" is corrected to read "31 U.S.C. 5151(b)".

3. In § 159.35, in the first sentence, the reference "31 U.S.C. 372(c)(2)" is corrected to read "31 U.S.C. 5151(e)".

4. In § 159.43, at the beginning of the first sentence, the word "Additional" is removed.

PART 171—FINES, PENALTIES, AND FORFEITURES

1. The authority citation for Part 171 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1592, 1618, 1624.

* * * * * * *

2. In Appendix C to Part 171, in section II, at the end of paragraph E.2., the reference "19 CFR 141.133" is corrected to read "19 CFR 141.33".

PART 177—ADMINISTRATIVE RULINGS

1. The general authority citation for Part 177 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

2. In § 177.2, the first sentence of paragraph (b)(2)(iii) is amended by removing the words "subparts C and D of part 152" and adding, in their place, the words "subpart C of part 152".

PART 191—DRAWBACK

1. The authority citation for Part 191 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * * * *

Sections 191.131(a), 191.133, 191.137, 191.139 also issued under 19 U.S.C. 1557;

* * * * * * *

2. In § 191.91, the reference "§ 191.4(a)(10)" at the end within the parentheses is corrected to read "§ 191.4(a)(12)".

3. In § 191.131, at the end of paragraph (a), the reference "§ 191.4(a)(11)" within the parentheses is corrected to read "§ 191.4(a)(13)".

4. In § 191.161:

a. The words "fourth provision" are removed and the words "fourth proviso" are added in their place; and

b. The reference "§ 191.4(a)(12)" at the end within the parentheses is corrected to read "§ 191.4(a)(14)".

GEORGE J. WEISE,
Commissioner of Customs.

Approved: August 20, 1997.

DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 3, 1997 (62 FR 51766)]

(T.D. 97–83)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: OCTOBER 1, 1997 THROUGH DECEMBER 31, 1997

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.728000
Austria	Schilling	0.080000
Belgium	Franc	0.027255
Brazil	Cruzado	0.911660
Canada	Dollar	0.725111
China, P.R.	Renminbi yuan	0.120266
Denmark	Krone	0.147907
Finland	Markka	0.188090
France	Franc	0.167701
Germany	Deutsche mark	0.563253
Hong Kong	Dollar	0.129249
India	Rupee	0.027624
Iran	Rial	N/A
Ireland	Pound	1.450500
Israel	Shekel	N/A
Italy	Lira	0.000575
Japan	Yen	0.008278
Malaysia	Dollar	0.296956
Mexico	Peso	0.128937
Netherlands	Guilder	0.500075
New Zealand	Dollar	0.642500

FOREIGN CURRENCIES—Quarterly rates of exchange: October 1, 1997 through December 31, 1997 (continued):

Country	Name of currency	U.S. dollars
Norway	Krone	$0.140135
Philippines	Peso	N/A
Portugal	Escudo	0.005528
Singapore	Dollar	0.651466
South Africa, Republic of	Rand	0.213995
Spain	Peseta	0.006676
Sri Lanka	Rupee	0.016722
Sweden	Krona	0.131544
Switzerland	Franc	0.684510
Thailand	Baht (tical)	0.027816
United Kingdom	Pound	0.614500
Venezuela	Bolivar	0.002006

Dated: October 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–84)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR SEPTEMBER 1997

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): September 1, 1997.

Greece drachma:

September 1, 1997	$0.003521
September 2, 1997	.003469
September 3, 1997	.003500
September 4, 1997	.003493
September 5, 1997	.003524
September 6, 1997	.003524
September 7, 1997	.003524
September 8, 1997	.003516
September 9, 1997	.003516
September 10, 1997	.003534
September 11, 1997	.003571

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 1997 (continued):

Greece drachma (continued):

September 12, 1997	$0.003586
September 13, 1997	.003586
September 14, 1997	.003586
September 15, 1997	.003593
September 16, 1997	.003580
September 17, 1997	.003570
September 18, 1997	.003560
September 19, 1997	.003574
September 20, 1997	.003574
September 21, 1997	.003574
September 22, 1997	.003530
September 23, 1997	.003527
September 24, 1997	.003563
September 25, 1997	.003582
September 26, 1997	.003589
September 27, 1997	.003589
September 28, 1997	.003589
September 29, 1997	.003599
September 30, 1997	.003584

South Korea won:

September 1, 1997	$0.001105
September 2, 1997	.001104
September 3, 1997	.001103
September 4, 1997	.001100
September 5, 1997	.001100
September 6, 1997	.001100
September 7, 1997	.001100
September 8, 1997	.001099
September 9, 1997	.001098
September 10, 1997	.001098
September 11, 1997	.001098
September 12, 1997	.001098
September 13, 1997	.001098
September 14, 1997	.001098
September 15, 1997	.001098
September 16, 1997	.001098
September 17, 1997	.001098
September 18, 1997	.001096
September 19, 1997	.001092
September 20, 1997	.001092
September 21, 1997	.001092
September 22, 1997	.001092
September 23, 1997	.001092
September 24, 1997	.001092
September 25, 1997	.001091
September 26, 1997	.001089
September 27, 1997	.001089
September 28, 1997	.001089
September 29, 1997	.001091
September 30, 1997	.001091

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 1997 (continued):

Taiwan N.T. dollar:

September 1, 1997	$0.034698
September 2, 1997	.034602
September 3, 1997	.034602
September 4, 1997	.034783
September 5, 1997	.034843
September 6, 1997	.034843
September 7, 1997	.034843
September 8, 1997	.034602
September 9, 1997	.034602
September 10, 1997	.034843
September 11, 1997	.034843
September 12, 1997	.034843
September 13, 1997	.034843
September 14, 1997	.034843
September 15, 1997	.034843
September 16, 1997	.034843
September 17, 1997	.034904
September 18, 1997	.034843
September 19, 1997	.034843
September 20, 1997	.034843
September 21, 1997	.034843
September 22, 1997	.034843
September 23, 1997	.034892
September 24, 1997	.034892
September 25, 1997	.034892
September 26, 1997	.034771
September 27, 1997	.034771
September 28, 1997	.034771
September 29, 1997	.034892
September 30, 1997	.034892

Dated: October 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–85)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR SEPTEMBER 1997

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 97–77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): September 1, 1997.

Austria schilling:	
September 2, 1997	$0.077501
Belgium franc:	
September 2, 1997	$0.026413
Denmark krone:	
September 2, 1997	$0.143246
Finland markka:	
September 2, 1997	$0.181192
September 3, 1997	.183332
France franc:	
September 2, 1997	$0.162075
Germany deutsche mark:	
September 2, 1997	$0.545554
Italy lira:	
September 2, 1997	$0.000560
Japan yen:	
September 2, 1997	$0.008227
September 3, 1997	.008262
September 4, 1997	.008284
September 5, 1997	.008258
September 6, 1997	.008258
September 7, 1997	.008258
September 8, 1997	.008263
September 12, 1997	.008269
September 13, 1997	.008269
September 14, 1997	.008269
September 16, 1997	.008258
September 17, 1997	.008265
September 18, 1997	.008198
September 19, 1997	.008201
September 20, 1997	.008201
September 21, 1997	.008201
September 22, 1997	.008180
September 23, 1997	.008228
September 25, 1997	.008244

FOREIGN CURRENCIES—Variances from quarterly rates for September 1997 (continued):

Japan yen (continued):	
September 26, 1997	$0.008273
September 27, 1997	.008273
September 28, 1997	.008273
September 29, 1997	.008264
September 30, 1997	.008284
Malaysia dollar:	
September 1, 1997	$0.342466
September 2, 1997	.341647
September 3, 1997	.335345
September 4, 1997	.333890
September 5, 1997	.338983
September 6, 1997	.338983
September 7, 1997	.338983
September 8, 1997	.342759
September 9, 1997	.343053
September 10, 1997	.342877
September 11, 1997	.338123
September 12, 1997	.336814
September 13, 1997	.336814
September 14, 1997	.336814
September 15, 1997	.336022
September 16, 1997	.333333
September 17, 1997	.332226
September 18, 1997	.331126
September 19, 1997	.329381
September 20, 1997	.329381
September 21, 1997	.329381
September 22, 1997	.320000
September 23, 1997	.325203
September 24, 1997	.326797
September 25, 1997	.320256
September 26, 1997	.318218
September 27, 1997	.318218
September 28, 1997	.318218
September 29, 1997	.313480
September 30, 1997	.307929
Netherlands guilder:	
September, 1997	$0.484238
New Zealand dollar:	
September 1, 1997	$0.638500
September 2, 1997	.633500
September 3, 1997	.634200
September 4, 1997	.637800
September 5, 1997	.636100
September 6, 1997	.636100
September 7, 1997	.636100
September 8, 1997	.637400
September 9, 1997	.636000
September 10, 1997	.635800
September 11, 1997	.633000
September 12, 1997	.634000
September 13, 1997	.634000
September 14, 1997	.634000

FOREIGN CURRENCIES—Variances from quarterly rates for September 1997 (continued):

New Zealand dollar (continued):

September 15, 1997	$0.636000
September 16, 1997	.633700
September 17, 1997	.636300
September 18, 1997	.630500
September 19, 1997	.633500
September 20, 1997	.633500
September 21, 1997	.633500
September 22, 1997	.634700
September 23, 1997	.636000
September 24, 1997	.638500
September 25, 1997	.641300
September 26, 1997	.641200
September 27, 1997	.641200
September 28, 1997	.641200
September 29, 1997	.637500
September 30, 1997	.639800

Portugal escudo:

September 2, 1997	.$0.005382

Singapore dollar:

September 1, 1997	$0.660066
September 2, 1997	.659631
September 3, 1997	.658979
September 4, 1997	.658328
September 5, 1997	.660066
September 6, 1997	.660066
September 7, 1997	.660066
September 8, 1997	.663790
September 9, 1997	.665336
September 10, 1997	.663570
September 11, 1997	.661376
September 12, 1997	.660939
September 13, 1997	.660939
September 14, 1997	.660939
September 15, 1997	.663130
September 16, 1997	.661813
September 17, 1997	.659413
September 18, 1997	.658545
September 19, 1997	.658762
September 20, 1997	.658762
September 21, 1997	.658762
September 22, 1997	.654236
September 23, 1997	.660502
September 24, 1997	.660502
September 25, 1997	.657678
September 26, 1997	.655523
September 27, 1997	.655523
September 28, 1997	.655523
September 29, 1997	.653808
September 30, 1997	.653381

FOREIGN CURRENCIES—Variances from quarterly rates for September 1997 (continued):

Thailand baht (tical):

September 1, 1997	$0.028986
September 2, 1997	.028944
September 3, 1997	.027972
September 4, 1997	.027816
September 5, 1997	.028450
September 6, 1997	.028450
September 7, 1997	.028450
September 8, 1997	.029197
September 9, 1997	.029806
September 10, 1997	.029240
September 11, 1997	.028571
September 12, 1997	.028329
September 13, 1997	.028329
September 14, 1997	.028329
September 15, 1997	.028329
September 16, 1997	.028050
September 17, 1997	.027816
September 18, 1997	.028090
September 19, 1997	.027894
September 20, 1997	.027894
September 21, 1997	.027894
September 22, 1997	.027360
September 23, 1997	.028353
September 24, 1997	.028450
September 25, 1997	.028777
September 26, 1997	.028612
September 27, 1997	.028612
September 28, 1997	.028612
September 29, 1997	.027972
September 30, 1997	.027894

Dated: October 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

PERFORMANCE REVIEW BOARD— APPOINTMENT OF MEMBERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This Notice announces the appointment of the members of the United States Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executives' performance appraisals and make recommendations regarding performance appraisals and performance awards.

EFFECTIVE DATE: October 1, 1997

FOR FURTHER INFORMATION CONTACT: Robert M. Smith, Personnel Director, Office of Human Resources Management, United States Customs Service, 1301 Constitution Avenue, N.W., (Gelman Building, Room 6100), Washington, D.C. 20229; Telephone (202) 634–5270.

BACKGROUND

There are two (2) PRB's in the U.S. Customs Service.

Performance Review Board 1.

The purpose of this Board is to review the performance appraisals of senior executives rated by the Acting Commissioner of Customs. The members are:

W. Ralph Basham, Assistant Director, Office of Administration, U.S. Secret Service
Elisabeth A. Bresee, Deputy Assistant Secretary (Enforcement), Department of the Treasury
John C. Dooher, Director, Washington Center, Federal Law Enforcement Training Center General Office
Mitchell A. Levine, Assistant Commissioner, Management and Chief Financial Officer, Financial Management Service
Jane L. Sullivan, Director, Information Resources Management, Department of the Treasury

Performance Review Board 2.

The purpose of this Board is to review the performance appraisals of all senior executives *except* those rated by the Acting Commissioner of

Customs. All are Assistant Commissioners of the U.S. Customs Service. The members are:

Assistant Commissioners

Douglas M. Browning, Office of International Affairs
Vincette L. Goerl, Office of Finance
Edward F. Kwas, Office of Information & Technology
Stuart P. Seidel, Office of Regulations and Rulings
Deborah J. Spero, Office of Human Resources Management
Bonni G. Tischler, Office of Investigations
Robert S. Trotter, Office of Field Operations
Homer J. Williams, Office of Internal Affairs
Charles W. Winwood, Office of Strategic Trade

Dated: September 24, 1997.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 1, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING RELATING TO NAFTA PREFERENCE AND COUNTRY OF ORIGIN MARKING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a ruling letter concerning a claim for preferential duty treatment under the North American Free Trade Implementation Act (NAFTA) and country of origin marking.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to claims for NAFTA preference and country of origin marking. Notice of the proposed modification was published August 13, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 33.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse, for consumption on or after December 15, 1997.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 927–1034.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In NY A89110, Customs found that two surgical kits ("Dry Skin Scrub Tray Kit" and "Wet Skin Scrub Tray Kit") were "goods put up in sets for retail sale", under General Rule of Interpretation (GRI) 3, Harmonized Tariff Schedule of the United States (HTSUS). Customs also held that each kit was eligible for preferential duty treatment under the NAFTA, that the country of origin of each kit was Mexico, and that ac-

cordingly both surgical kits were eligible for the "Special" MX duty rate. Customs also found that an appropriate marking for each kit would be "Assembled in Mexico from U.S. components; glove made in Malaysia."

This office has reviewed NY 89110 upon a request for clarification by the person who asked for the ruling, and it is our opinion that the ruling is partially in error. Based on application of the 19 CFR Part 102 NAFTA Marking Rules, Customs now finds that the country of origin of the Dry Skin Scrub Tray Kit and the Wet Skin Scrub Tray Kit is the U.S. Further, as the goods are of U.S.-origin, the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking, as it indicates that the kits are of Mexican origin. As the kits are considered to be of U.S.-origin, they are not subject to country of origin marking requirements.

Therefore, Customs proposed in a document published in the CUSTOMS BULLETIN, Volume 31, No. 33, that NY 89110 be modified to reflect that the country of origin of the Dry Skin Scrub Tray Kit and Wet Skin Scrub Tray Kit is the U.S., that the two kits will not be eligible for the "Special" MX rate of duty, and that the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking. Two comments were received in response to the notice.

One commenter is of the opinion that the NAFTA parties did not intend to deny preferential tariff treatment to an originating NAFTA good, and that the denial of such treatment by the U.S. is not in conformity with the rules of its NAFTA partners. This commenter believes that the NAFTA Marking Rules should be interpreted to grant preferential tariff treatment as intended by the NAFTA parties or, in the alternative, Customs should redraft the origin rules to allow for such treatment. Until such time, the commenter believes that Customs should postpone modification of NY 89110 and, in addition, Customs should commence revocation proceedings for Headquarters Ruling Letter (HRL) 559421 (dated September 16, 1996), in which Customs also found that a determination of U.S.-origin for an originating good would result in denial of NAFTA preferential tariff treatment. The commenter is also of the opinion that the proposed ruling is unclear that the surgical kits, and not just the components of the kits, are not subject to the marking requirements.

Customs believes that the determination of U.S.-origin in NY A89110 (and in HRL 559421, which provided that a finding is made that the U.S. and not Canada is the last NAFTA country in which the good undergoes production other than minor processing) is based on a correct analysis of the NAFTA Marking Rules. General Note 12(a), Harmonized Tariff Schedule of the United States (HTSUS), provides that to be eligible for the "MX" rate of duty, the good must originate in a NAFTA country and be a product of Mexico. To be eligible for the "CA" rate of duty, an originating good must be a product of Canada. Therefore, Customs believes that its determination in NY A89110 and in HRL 559421 (based upon a

finding of U.S.-origin, see above), that the "MX" or "CA" duty rate, respectively, is not available in these cases is based on a proper interpretation of applicable law and regulation. As a result, we find no reason to revoke HRL 559421, nor to postpone modification of NY A89110. However, Customs is currently considering an amendment of the Customs Regulations which would address these concerns. Notice of any proposed amendment to the Customs Regulations will be published in the Federal Register, in accordance with applicable law.

Customs also believes that the proposed ruling makes clear that the country of origin of the scrub tray kits is the U.S., and that accordingly the kits are not subject to the marking requirements. However, Customs erred in the proposed ruling by providing in the **"HOLDING"** that the kits were excepted from marking pursuant to 19 CFR 134.32(m). Since one component of the surgical kits, the latex gloves, is of Malaysian origin, 19 CFR 134.32(m) is not applicable to the imported surgical kits as it applies only to U.S. products "exported and returned." As a result, Customs has amended the language in the **"HOLDING"** as well as in the body of the proposed ruling, to eliminate any reference to 19 CFR 134.32(m), and to indicate only that as the imported surgical kits are considered to be of U.S.-origin, they are not subject to the marking requirements.

The second commenter states that the latex gloves of Malaysian origin meet the *de minimus* requirement under 19 CFR 102.13(a) and should be classifiable under subheading 9801.00.10 with the U.S. components and thus not subject to duty. Should Customs not concur with this proposed treatment, the commenter believes that Customs should withdraw the proposed modification pending consideration of a proposed change to the Customs Regulations which would allow a NAFTA preferential duty rate under the ruling facts.

The facts as set out in the original ruling request did not itemize the value of the latex gloves nor otherwise suggest that this component of the sets was of a *de minimus* value. Neither did the request for clarification address this issue. Any change or supplement to the ruling facts should have been brought to Customs attention prior to the original Customs ruling or upon request for clarification. Customs believes it inappropriate in this document to address the issue of *de minimus* as Customs is required to review comments concerning *only* the Customs proposed modification based on the facts as set out in the original ruling. Any additional facts raising new issues may be brought to Customs attention in the context of an additional ruling request under 19 CFR Part 177. In addition, as explained in our response to the first commenter, Customs finds no reason to withdraw the proposed modification of NY A89110. As also noted, Customs is currently considering amending the Customs Regulations to address this commenter's concerns regarding the applicability of a NAFTA preferential rate of duty under the ruling facts.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–82, 187 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NY A89110 to indicate that the country of origin of the Dry Skin Scrub Tray Kit and Wet Skin Scrub Tray Kit is the U.S., that the two kits will not be eligible for the "Special" MX rate of duty, and that the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking. A copy of the ruling letter modifying NY A89110 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 26, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 26, 1997.

MAR–05: RR:TC:SM 560456 BLS
Category: Marking

MS. ELVA ARZATE
RUDOLPH MILES & SONS
4950 Gateway East
El Paso, TX 79983

Re: Reconsideration of NY Ruling Letter A89110; surgical sets; NAFTA Preference; country of origin marking; Article 509.

DEAR MS. ARZATE:

This is in reference to your letter dated April 28, 1997, requesting clarification of NY Ruling Letters A89110 (November 25, 1996) and B83438 (April 15, 1997).

Facts:

In your ruling request dated October 15, 1996, you asked that Customs rule on the tariff classification and country of origin marking of four surgical kits imported from Mexico, and whether such kits are eligible for preferential duty treatment under the North American Free Trade Implementation Act (NAFTA). Customs addressed these issues in NY A89110 with respect to Kit #1 and Kit #2, and in NY B83438 with respect to Kit #3 and Kit #4. You believe that the rulings may not be consistent and therefore seek a clarification of Customs position. This ruling will deal only with NY A89110. A second ruling addressing your concerns in connection with NY B83438 will be issued under separate cover.

Dry Skin Scrub Tray (Kit #1)

This kit consists of plastic trays, plastic forcep, plastic sponge stick and plastic wing sponge; absorbent paper towel, blotting paper towel, and blue paper towel; cotton swabs

and latex gloves. The items are all of U.S.-origin with the exception of the latex gloves, which are a product of Malaysia.

Wet Skin Scrub Tray (Kit #2)

The items in this kit consist of plastic trays, plastic sponge stick and plastic wing sponge; absorbent paper towel, blotting paper towel and blue paper towel; povidone iodine scrub solution and povidone iodine paint solution; latex glove and cotton swabs. All of the items are of U.S.-origin, with the exception of the latex gloves, which are a product of Malaysia.

The articles in both kits are packaged in Mexico with U.S.-origin packing materials, and then imported into the U.S.

In NY A89110, Customs found that Kit #1 and Kit #2 were "goods put up in sets for retail sale", and were governed by General Rule of Interpretation (GRI) 3(c), Harmonized Tariff Schedule of the United States (HTSUS), which provides that when goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. The sets were classified under subheading 4818.20.0020, HTSUS, which provides for: "Towels of paper pulp, paper, cellulose wading or webs of cellulose fibers." Customs also held that each kit was eligible for preferential duty treatment under the NAFTA, that the country of origin of the scrub tray kits was Mexico, and that accordingly the kits were eligible for the "Special" "MX" duty rate. Customs also found that an appropriate marking for each kit would be "Assembled in Mexico from U.S. components; glove made in Malaysia." Our review will address the issues related to NAFTA preferential treatment and country of origin marking requirements.

Issues:

1) Whether the Dry Skin Scrub Tray and the Wet Skin Scrub Tray are eligible for preferential duty treatment under the NAFTA.

2) What are the country of origin marking requirements for the two surgical kits?

Law and Analysis:

A. *NAFTA Preference*

General Note 12 of the HTSUS, incorporates Article 401 of the NAFTA into the HTSUS. General Note 12(b) provides in pertinent part the following:

> For purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if:
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
>
> (ii) they have been transformed in the territory of Canada, Mexico, and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or,
>
> (B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Since, as described, each of the sets is comprised in part of materials which come from countries other than Mexico, Canada and/or the United States, neither General Note 12(b)(i) or 12(b)(iii) is applicable. Therefore, we must ascertain whether the non-originating materials in each case (latex gloves from Malaysia) are transformed in the territory of Canada, Mexico and/or the U.S. pursuant to General Note 12(b)(ii)(A), HTSUS. To qualify under this provision, the non-originating material(s) must undergo the requisite change in tariff classification required in General Note 12(t).

As noted, both surgical kits are classified in subheading 4818.20.0020, HTSUS, as "Towels of paper pulp, paper, cellulose wading or webs of cellulose fibers." The non-originating latex gloves are properly classified in 4015.11, HTSUS, as "Articles of apparel and clothing accessories (including gloves) for all purposes, of vulcanized rubber, surgical and medical."

General Note 12(t)(90)(48), HTSUS, requires "A change to headings 4817 through 4823 from any heading outside that group."

Thus, the requisite change in tariff classification does occur with respect to Kit #1 and Kit #2, and the *Dry Skin Scrub Tray* and *Wet Skin Scrub Tray* are considered to be "goods originating in the territory of a NAFTA party."

General Note 12(a) provides in pertinent part that:

* * * * * * *

> (ii) Goods that originate in the territory of a NAFTA party under subdivision (b) of this note and that qualify to be marked as goods of Mexico under the terms of the marking rules * * * and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "MX" in parentheses, are eligible for such duty rate * * *.

Since Kit #1 and Kit #2 are classified under subheading 4818.20, HTSUS, a subheading for which the "Special" rate of duty of "MX" is applicable, and are "originating" goods under General Note 12(b), HTS US, they will be eligible for the MX duty rate provided they are determined to be a product of Mexico under the NAFTA Marking Rules.

B. *Country of Origin Marking*

The marking statute, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The country of origin marking requirements for a "good of a NAFTA country" are also determined in accordance with Annex 311 of the NAFTA, as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (December 8, 1993) and the regulations set forth in 19 CFR Parts 102, 134.

Section 134.1(b) (19 CFR 134.1(b)) of the regulations defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin"; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Section 134.1(j) provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.

Part 102 of the regulations (19 CFR Part 102), sets forth the "NAFTA Marking Rules" for purposes of determining whether a good is a good of a NAFTA country. Section 102.11 of the regulations (19 CFR 102.11) sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) provides that "[t]he country of origin of a good is the country in which:

> (1) The good is wholly obtained or produced;
> (2) The good is produced exclusively from domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied.

"Foreign Material" is defined in section 102.1(e) of the regulations as "a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced."

Since neither Kit #1 or Kit #2 is wholly obtained or produced, or produced exclusively from domestic (Mexican) materials, section 102.11(a)(3) is the applicable rule which must first be applied. In order to determine whether Mexico is the country of origin under this rule, we must look at those materials whose country of origin is other than Mexico. In this case, none of the components (materials) of the kits are products of Mexico, but are either of U.S. ("Foreign Material" under 19 CFR 102.11(e)) or Malaysian origin.

As both sets are classified under subheading 4818.20, HTSUS, the change in tariff classification must be made in accordance with section 102.20(r), Section X: Chapters 47 through 49, which provides as follows:

> A change to headings 48.17 through 48.22 from any other heading, including another heading within that group.

Since Kit #1 and Kit #2 are comprised in part of components (paper towels of U.S.-origin) that are classified under heading 4818, HTSUS, and which therefore do not undergo a tariff shift, the country of origin cannot be determined under 19 CFR 102.11(a)(3). Furthermore, since the foreign materials in each of the sets are merely packaged together for importation without more than minor processing, they will not be considered to have met the applicable change in tariff classification set out in 19 CFR 102.20. *See* 19 CFR 102.17.

Therefore, we must consider the next applicable rule in the hierarchal scheme. Section 102.11(b) of the regulations (19 CFR 102.11(b)) cannot be used under the facts presented since it is not applicable if the good is specifically described in the Harmonized System as a set, or is classified as a set pursuant to GRI 3.

Since each set is deemed to be originating, and a single NAFTA country of origin for each of the sets cannot be determined pursuant to 19 CFR 102.11(a) or 19 CFR 102.11(b), the NAFTA Preference Override (19 CFR 102.19) is triggered. This regulation provides as follows:

> (a) Except in the case of goods covered by paragraph (b) of this section, if a good which is originating * * * is not determined under section 102.11(a) or (b) or 102.21 to be a good of a single NAFTA country, the country of origin of such good is the last NAFTA country in which the good underwent production other than minor processing provided that a Certificate of Origin (see section 181.11 of this chapter) has been completed and signed for the good.
>
> (b) If, under any provision of this part, the country of origin of a good which is originating * * * is determined to be the United States and that good has been exported from, and returned to, the United States after having been advanced in value or improved in condition in another NAFTA country, the country of origin of such good for Customs duty purposes is the last NAFTA country in which that good was advanced in value or improved in condition.

The components of Kit #1 and Kit #2 are of U.S. or Malaysian origin, and are merely packaged together in Mexico. Since packaging operations are considered minor processing (see 19 CFR 102.1(m)(6)), pursuant to 19 CFR 102.19(a) Mexico cannot be considered the country of origin. Therefore, the country of origin will be the U.S., the last NAFTA country in which the good undergoes production other than minor processing. (In this regard, we note that the word "single" in 19 CFR 102.19(a) expressly makes clear that originating goods that meet the criteria of this provision cannot have multiple countries of origin.) Section 102.19(b) is not applicable because the U.S. components were not advanced in value or improved in condition in another NAFTA country, i.e., by the packing operations performed in Mexico. (*See* 19 CFR 102.1(a) and 102.1(i) (definitions of "advanced in value" and "improved in condition").)

C. *"MX" Duty Rate*

Since under no provision of the NAFTA Marking Rules are the scrub tray kits considered to be of U.S.-origin, they are not eligible for the Special "MX" rate of duty pursuant to General Note 12(a)(ii), HTSUS.

Furthermore, as articles of U.S.-origin, the surgical kits are not subject to the marking requirements.

D. *Subheading 9801.00.10*

Subheading 9801.00.10, HTSUS, generally provides for the free entry of products of the U.S. that have been exported and returned without having been advanced in value or improved in condition by any process or manufacture or other means while abroad. Accordingly, the U.S.-origin components which are merely packaged with the set without further processing and the U.S.-origin packaging materials will be entitled to duty-free treatment under subheading 9801.00.10, HTSUS, provided the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1) are met.

Holding:

1) The non-originating materials which are packaged as part of the Scrub Tray Kits undergo a tariff shift pursuant to General Note 12(b)(ii)(A). Therefore, the *Dry Skin Scrub Tray Kit* and the *Wet Skin Scrub Tray Kit* are considered "goods originating in the territory of a NAFTA party."

2) Under the NAFTA Marking Rules, 19 CFR 102.11(a) is not applicable since the kits are neither wholly obtained or produced, or produced exclusively from domestic sources and the non-originating materials do not undergo a tariff shift under the applicable rule.

Further, since the goods are merely packaged without more than minor processing, they will not be considered to have met the change in classification set out in 19 CFR 102.20. *See* 19 CFR 102.17. 19 CFR 102.11(b) is not applicable since the kits are classified as sets pursuant to GRI 3(c), HTSUS.

As each set is deemed to be originating, 19 CFR 102.19 is triggered. Under this rule, the country of origin of each set will be the U.S., the last NAFTA country in which the good undergoes production other than minor processing.

3) Since under no provision of the NAFTA Marking Rules are the scrub tray kits considered to be products of the U.S., they are not eligible for the Special "MX" rate of duty pursuant to General Note 12(a)(ii), HTSUS.

4) The U.S.-origin set components which are merely packaged without further processing and the U.S.-origin packaging materials will be entitled to duty-free treatment under subheading 9801.00.10, HTSUS, provided the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1) are met.

NY Ruling A89110 is modified to the extent it held that the country of origin of the two Scrub Tray Kits to be Mexico, and not the U.S., and that the Special "MX" rate of duty was applicable. Further, the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking, as it indicates that the kits are of Mexican origin. As the kits are considered to be of U.S.-origin, they are not subject to the marking requirements.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING RELATING TO THE COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR IMPORTED DECORATIVE DECALS APPLIED TO IMPORTED CHINAWARE ARTICLES IN THE UNITED STATES

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of Customs ruling.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to partially revoke a ruling pertaining to the country of origin marking requirements of imported decorative decals applied to finished imported chinaware articles in the United States.

DATE: Comments must be received on or before November 14, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, located at the address listed above.

FOR FURTHER INFORMATION CONTACT: Kristen K. Ver Steeg, Special Classification and Marking Branch, (202) 927–2310.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to partially revoke a ruling pertaining to the country of origin marking requirements of imported decorative decals applied to finished imported chinaware articles in the United States.

In HRL 734052, dated October 17, 1991 (also published as C.S.D. 93–1, 27 Cust. Bull. 10 (1991), set forth as Attachment A to this document), Customs considered porcelain dinnerware and decals imported into the U.S. for domestic assembly into finished signed, numbered collectable (non-food use) plates. Customs held that neither the plates nor the decals were substantially transformed by the domestic application of the decals to the plates, and required that the finished plates be marked with the origin of the decal as well as the origin of the porcelain plate.

Upon review, however, we find that the position taken by Customs in HRL 734052, *supra*, regarding the substantial transformation of the imported decals was erroneous. Upon further review, it is our determination that the imported decals are substantially transformed by the domestic application thereof to the plates. Therefore, the finished plate is not required to be marked with the country of origin of the imported decals. Accordingly, Customs intends to modify HRL 734052 to reflect this position. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 560223, modifying HRL 734052, is set forth as Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 26, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 17, 1991.

MAR05 CO:R:C:V 734052 GRV
Category: Marking

JERRY P. WISKIN, ESQ.
FREEMAN, WASSERMAN & SCHNEIDER
90 John Street
New York, NY 10038

Re: Country of origin marking of finished porcelain plates imported from Japan to be ornamented in the U.S. with foreign-sourced decorative decals. 19 CFR 134.35; substantial transformation; Uniroyal; Belcrest Linens; T.D. 89–21; 732964; C.S.D. 84–113; National Juice; Koru North America; FDA Compliance Policy Guides for lead and cadmium contamination (required and permanent labeling); Superior Wire; C.S.D. 91–7.

DEAR MR. WISKIN:

This is in response to your letters of February 22, July 16, and October 1, 1991, on behalf of Lenox Inc., requesting and supplementing a country of origin marking ruling regarding finished porcelain plates imported into the U.S. to have a decorative decal applied. Samples of the porcelain plates as imported and after having been decorated in the U.S. were submitted for examination.

We have considered in connection with this ruling request the information provided by you in two meetings that were held at Customs Headquarters on June 24 and October 1, 1991.

Facts:

Your client plans to import porcelain plate dinnerware from Japan and decorative decals from Germany (or another foreign source) and domestically combine the two items into signed, numbered collectable plates. Although you denominate the imported porcelain plates "blanks," they are finished articles—glazed with an ornamental gold band around their edge; suitable for use as dinnerware. When imported, each plate is valued at $1.20 and the country of origin is denoted by an adhesive sticker affixed to its bottom. The decorative decals are made with inks containing lead and cadmium. When imported, each decal is valued at $1.15, however, they are not individually marked to indicate their foreign origins. The domestic processing entails attaching two decals to each plate: the foreign-sourced decorative decal is moistened and applied to the top, front-side of the "blank," i.e., undecorated, plate, and a domestically-produced, two-color backstamp decal, containing the recommended warning of the U.S. Food and Drug Administration (FDA) that the article is "not for food use," is moistened and applied to the bottom, back-side of the plate. The decorated plate is then dried for 24 hours and fired in a kiln. The plate is then hand-numbered in gold on the bottom side, refired, packaged and sold as a finished, collectible. You submit that the processing involved here is a sophisticated process, which occurs over a fixed-period of days. These domestic operations are valued at $4.20, which includes the cost of packaging materials. The entire transaction is valued at $6.55 per decorated plate.

You state that the imported porcelain plates are substantially transformed by these U.S. processing operations so as to exempt them from the country of origin marking requirements of 304 of the Tariff Act of 1930, and reference certain court decisions and administrative rulings in support of this contention. You claim that the domestic processing alters the character, name and use of the "blank" plate to that of a decorative collectible item. Further, you state that the domestic processing adds significant value to the imported porcelain plate—quadrupling its value—and, although the domestic processing could result in the porcelain plates changing tariff classifications—from subheading 6911.10.4900 to subheading 6913.10.50, Harmonized Tariff Schedule of the United States (HTSUS), you acknowledge that this change is not dispositive on the question of whether a substantial transformation has occurred. Lastly, you state that the safety warning required by the FDA is a significant consideration, which renders the plate unsuitable for use as tableware intended for food service, and that this circumstance establishes that the domestic processing has created a new and different article of commerce.

Issue:

Whether the application of decorative decals to finished porcelain plates constitutes a substantial transformation of the imported articles for purposes of the country of origin marking requirements of 19 U.S.C. 1304 and 19 CFR 134.35 and 134.1(d).

Law and Analysis:

The marking statute, 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The primary purpose of the country of origin marking statute is to "enable the 'ultimate purchaser' of the goods to decide for himself whether he would 'buy or refuse to buy them'." Uniroyal, Inc., v. United States, 3 CIT 220, 223, 542 F.Supp. 1026, 1028 (1982), aff'd per curium, 1 Fed.Cir. 21, 702 F.2d 1022 (1973).

The "ultimate purchaser" is defined generally as the last person in the U.S. who will receive the article in the form in which it was imported. 19 CFR 134.1(d). If an article is to be sold at retail in its imported form, the purchaser at retail is the "ultimate purchaser." 19 CFR 134.1(3). However, if an imported article will be used in manufacture, the manufacturer may be the "ultimate purchaser" if [s]he subjects the imported article to a process which results in a substantial transformation of the article, even though the process may not result in a new or different article. But, if the manufacturing process is a minor one which leaves the identity of the imported article intact, the consumer or user of the article, who obtains the article after the processing, will be regarded as the "ultimate purchaser." 19 CFR 134.1(d)(1) and (2).

A substantial transformation occurs when an imported article is used in the U.S. in manufacture, which results in an article having a name, character, or use differing from that of the imported article. Under this principle, the manufacturer or processor in the U.S. who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article, and the article shall be excepted from marking. However, the outermost containers of the imported articles must be marked. 19 CFR 134.35. As the issue of whether a substantial transformation occurs is for marking purposes a question of fact, it is determined on a case-by-case basis. Uniroyal.

Taken as a whole and after examining the samples submitted in this case, the conclusion is clear that a substantial transformation of the porcelain plate has not occurred since the attachment of the decorative decal to the porcelain plate is a minor manufacturing or combining process which leaves the identity of the porcelain plate intact. The domestic processing in this case ostensibly constitutes a minor assembly operation: attaching a decorative decal to a plate. See, Headquarters Ruling Letter (HRL) 555175 dated March 13, 1989, abstracted as C.S.D. 89–49(13), 23 Cust. Bull. 644 (1989), and HRL 555506 dated January 16, 1990, abstracted as C.S.D. 90–32(3), 24 Cust. Bull. ____ (1990). And we have long held that mere assembly operations do not constitute a substantial transformation. In determining whether the combining of parts or materials constitutes a substantial transformation, the issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. Belcrest Linens v. United States, 6 CIT 204, 573 F.Supp. 1149 (1983), aff'd, 2 Fed.Cir. 105, 741 F.2d 1368 (1984). Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See, C.S.D.s 80–111, 85–25, 89–110, 89–118, 89–129 and 90–97. The assembly operation performed here is a simple—two-step—combining process which leaves the identity of the imported porcelain plate—and decal—intact.

Further, regarding the decoration of ceramic products by painting or with decals in particular, Customs has long held that neither process constitutes a substantial transformation. In T.D. 89–21, 23 Cust.Bull. 157 (1989), Customs stated that the mere decoration of porcelainware does not constitute a substantial transformation. See also, HRL 732964 dated August 3, 1990 (imported ceramic "bisque ware" not substantially transformed by domestic hand painting operation). In C.S.D. 84–113, 18 Cust. Bull. 1111 (1084), Customs stated that decorating an already-glazed article by means of decalcomania, i.e., applying decals, and kiln firing does not effect a substantial transformation of the article, and that such processors were not the ultimate purchasers for marking purposes. In sum, we are not persuaded that processing here, which merely results in the decoration of finished ce-

ramics constitutes a substantial transformation, as the identity of imported article remains intact. Accordingly, given that no other country of origin marking exception is applicable, the imported porcelain plates here must be individually marked.

Addressing the substantial transformation criteria in turn, we find that the simple combining process performed in the U.S. does not effect a change in the name, character or use of the imported porcelain plates. Regarding the change in name, we find your characterization of the imported porcelain plates as "blanks" spurious, as they are finished plates, suitable for use as dinnerware. Further, assuming there is otherwise a change in name, such change in the name of the product is the weakest evidence of a substantial transformation. Uniroyal, National Juice Products Ass'n v. United States, 10 CIT 48, 628 F.Supp. 978 (1986), and Koru North America v. U.S., 12 CIT 1120, 701 F.Supp. 229 (1988). Regarding the change in character, we find none; the plates retain their essential identity/character as plates, albeit decorated ones. No change to the physical dimensions of the base plates occurs. Regarding the change in use, although we find a more restricted use for the imported plates in the area of commercial dinnerware—occasioned by the choice of metal poisons employed in the inks to make the foreign decal which requires that a FDA warning label be affixed—we do not believe this circumstance constitutes a substantial change in use for purposes of finding a substantial transformation.

Regarding the applicability of FDA guidelines requiring a safety warning in this case, in National Juice, the court noted that Customs and FDA regulations are promulgated under completely different statutes and hence one cannot be considered binding on the other. As FDA standards of identity are intended to aid in identifying the contents of a product and not to identify the origin of a product as a whole, they are not binding on Customs in a determination of whether a substantial transformation has occurred. Further, contra your assertion that the FDA labeling requirement evidences the unsuitability of the article for food service use and establishes that the domestic processing creates a new and different article of commerce, we note that the safety warning does not dictate that the ornamented plates cannot be used, under all circumstances, as food service plates. The warning label is required because certain ceramic wares have been found by the FDA to contain significant quantities of metal poisons, which can be extracted by food acids and could cause chronic poisoning under continued food use. Thus, the FDA warning/safety label is cautionary and does not mandate a particular use. And it is entirely possible, if not probable, that ultimate purchasers will occasionally offer articles of food on the adulterated plates, taking care to ensure that food items are protectively insulated from the plates surface or provide a medium layer of material to prevent the leaching of the metal poison to the food item.

Lastly, while significant value has been added to the imported articles here and a change in tariff classification is apparent, these considerations are not dispositive of whether a substantial transformation has taken place. See, Superior Wire v. United States, 11 CIT 608, 669 F.Supp. 472 (1987), aff'd, 7 Fed.Cir. 43, 867 F.2d 1409 (1989), and C.S.D. 91–7 (no substantial transformation of jewelry despite added value), concerning the value-added consideration, and Beicrest Linens v. United States, 6 CIT ____ F.Supp. ____ (1983), aff'd, 2 Fed.Cir. 105, 741 F.2d 1368 (1984), concerning the change in tariff classification consideration. We also conclude that the imported decal is also not substantially transformed when attached to the porcelain plate. Accordingly, not only must the porcelain plates be marked in a more permanent method of marking than by means of paper adhesive labels, C.S.D. 84–113, but after the domestic processing, the country of origin of the foreign-made decal must also be indicated on the decorated plate.

Holding:

The imported porcelain plates and decals are not substantially transformed by the domestic application of the decals to the top, front-side of the plates, as the decalcomania operation is a minor process which leaves the identity of the imported plates and decals intact. Accordingly, the plates must be individually marked with a more permanent means than the adhesive stickers currently used—to survive the U.S. processing operation—and, after the domestic processing operation, the plates must be further marked to indicate the country of origin of the foreign-made decal to satisfy the country of origin marking requirements of 19 U.S.C. 1304 and 19 CFR 134.1(d).

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–05 RR:TC:SM 560223 KKV
Category: Marking

MR. DAN GLUCK
SERKO & SIMON LLP
ONE WORLD TRADE CENTER
Suite 3371
New York, NY 10048

Re: Country of origin of imported "ceramic colors image" decals, bone china: substantial transformation; decalcomania; organic materials burned away during domestic processing: modification of HRL 734052: C.S.D. 93–1.

DEAR MR. GLUCK:

This is in response to your letter dated December 2, 1996, on behalf on Waterford Wedgwood USA, Inc. ("Wedgwood"), which requests a binding ruling regarding the country of origin of certain articles of china imported into the United States from England for further processing. Samples of a decal and a china plate at two stages of the production process have been submitted for our examination.

Facts:

We are informed that Wedgwood intends to import into the U.S. glazed, bone china tableware, accessories and giftware of English origin. Wedgwood also intends to import decals of various designs of Japanese, English and other sources of foreign origin into the U.S. origin. No information has been provided regarding the country of origin marking upon the plates or the decals at the time of importation. In the United States, Wedgwood will transfer the designs to the glazed, bone china via application of the decals and kiln firing, a process referred to as "decalcomania." In addition to the decal of the design patten, Wedgwood intends to simultaneously apply a decal of the backstamp, which will indicate the country of origin of the finished plate, in addition to other information.

With regard to the sample plate submitted for our examination, we are informed that, as a part of the processing performed in the U.S., the decal is removed from the paper backing and placed onto a glazed, but undecorated plate. Additionally, the plate is placed into a kiln and baked, during which:

1. the thousands of granules that make up the design will undergo a metamorphosis by melting and coagulating into one mass;
2. the melted and coagulated paint will adhere to the article of china;
3. the adhesive will melt;
4. the clear plastic film will burn away; and
5. a gold band will be applied to the rim, and the plate will be refired.

The Customs Service Office of Laboratories and Scientific Services was consulted with regard to the request for a binding ruling. In a report issued by that office, we are informed that the type of decal in question, a "ceramic colors image" which is suitable for the decoration of pottery and porcelain only, consists of a paper backing, an organic temporary adhesive or water-soluble adhering agent, plastic film, inorganic pigments in a given design and, in some cases, an inorganic adhesive (usually silicate).

To prepare the decal for firing, the decal is dampened, placed on the pottery or porcelain material (such as a plate) and dried. The paper backing is removed. Although the backing has been removed, the presence of a temporary adhesive or water-soluble adhering agent keeps the image affixed to the plate until heat is applied. Once the plate has reached a given temperature m the kiln, the organic materials (adhering agent, plastic film and carrier resins (if present)) are burned away. The plate is then raised to a higher "service" temperature, at which point the pigments will partially vitrify. Under partial vitrification, the pigment does not completely melt but the particles become soft and stick together without totally losing their shape. There is no chemical change in the pigment, but the applied heat results in a change in the crystallinity of the pigmentatious materials. Having undergone partial vitrification in the firing process, the design is transferred to the plate, where it has permanently fused with the porcelain or pottery surface.

You inquire whether the decals themselves or the finished articles must be marked with the country of origin of the imported decals and whether the finished china articles may be marked, "Fine English China" or "Made in England" or similar wording.

Issue:

Whether imported "ceramic colors image" decals are substantially transformed when applied to porcelain or ceramic articles for purposes of the country of origin marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. By enacting 19 U.S.C. 1304, Congress intended to ensure that the ultimate purchaser would be able to know by inspecting the marking on the imported goods the country of which the goods are the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *United Stares v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 C.A.D. 104 (1940).

Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

It is a well established policy, and it is not disputed here, that the decoration of imported ceramic or china articles by means of painting or decalcomania does not substantially transform these imported articles (*See* Treasury Decision (T.D.) 89–21, 23 Cust.Bull. 157 (1989); *See also* HRL 707057, dated December 10, 1976; HRL 058996, dated June 21, 1979; HRL 724978, dated July 13, 1984 (also published as Customs Service Decision (C.S.D.) 84–113, 18 Cust.Buil. 1111 (1984); HRL 732964, dated August 3, 1990); HRL 735595, dated August 2, 1994 and HRL 558734, dated November 4, 1994).

While agreeing that the plate is not substantially transformed by means of decoration, it is asserted that the imported decal is substantially transformed as a result of becoming affixed to the china plate. Customs has previously discussed the substantial transformation of decals. In HRL 734052, dated October 17, 1991 (also published as C.S.D. 93–1, 27 Cust. Bull. 10 (1991)), Customs considered porcelain dinnerware and decals imported into the U.S. for domestic assembly into finished signed, numbered collectable (non-food use) plates. Customs determined that neither the plates nor the decals were substantially transformed by the domestic application of the decals to the plates, as the decalcomania process left the identity of both the plates and decals intact. Upon review, however, we note that while the issue of substantial transformation was discussed in great detail with regard to the imported plates, the imported decals were not addressed with particularity. Therefore, we revisit this issue here.

The well-established test for determining whether a substantial transformation has occurred is derived from language enunciated by the court in *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556, 562 (1908), which defied the term "manufacture" as follows:

> Manufacture implies a change, but every change is not manufacture and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U.S. 609. There must be transformation; a new and different article must emerge, having a distinctive name, character or use.

Simply stated, a substantial transformation occurs "when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing." *See Texas Instruments, Inc. v. United States*, 69 CCPA 152, 681 F.2d 778 (1982) (cited with approval in *Torrington Co. v. United States*, 764 F. 2d 1563, 1568 (1985)).

In C.S.D. 93–1, *supra*, Customs determined that no substantial transformation of the decals had taken place because "the decalcomania process left the identity of both the

plates and decals intact." However, in the matter before us, while the pigment design of the "ceramic colors image" is, indeed, transferred intact, the "decal" itself undergoes significant changes as a result of domestic processing. The article at issue, a "ceramic colors image" decal, is, by its very nature, a "temporary" article which serves as an instrumentality of transference of ceramic colors. In the vitrification process, organic agents present in the original decal (temporary adhesive or water-soluble adhering agent plastic film and carrier resins) are burned away and the transferred pigment undergoes a change in crystallinity. Once partially vitrified, it permanently fuses to the surface of the chinaware. It is no longer a "decal" but is a permanent part of the plate (or other chinaware article). Inasmuch as the organic agents present in the original decal are no longer present to assist in a second transfer, what remains is not a "decal" but the pigment image whose revitrification (if possible) would ruin both the pigment design and the plate or other china article upon which it rests. Consequently, as a result of processing, the original decal has undergone a change in name, character and use—prerequisites for a finding of a substantial transformation. Therefore, the U.S. processor is the "ultimate purchaser" of the imported decals. *See* 19 CFR 134.1(d) and 134.35. Accordingly, neither the porcelain articles nor the decals themselves must be marked with the country of origin of the decals. However, the outermost containers in which the decals are imported must be marked with the country of origin of the decals.

Notwithstanding our modification of C.S.D. 93–1, *supra*, we note that the sample plate submitted displays no country of origin marking of any kind. No information has been provided regarding the marking of the plates upon importation into the United States. In keeping with well established policy, both Customs and counsel are in agreement that the plates (or other ceramic articles) are not substantially transformed as a result of processing in the U.S. Therefore, it is not sufficient to mark only the outermost bulk container of the plates with the country of origin of its contents. Instead, each individual plate (or individual container) must be marked, at the time of importation, as legibly, indelibly, and permanently as the nature of the article (or its container) will permit. With regard to the marking of porcelain plates, Customs has held that the plates must be individually marked with a more permanent means than adhesive stickers, so as to survive the U.S. processing operations, in order to satisfy the country of origin marking requirements of 19 U.S.C. 1304. The proposed markings, "Fine English China" or "Made in England" or similar words meet the requirements of 19 U.S.C. 1304 and 19 CFR Part 134.

Holding:

Based upon the described facts, the application of a "ceramic colors image" decal to finished porcelain articles results in a substantial transformation of the imported decals and the U.S. processor is the ultimate purchaser of the imported decals. Thus, neither the finished porcelain articles nor the decals themselves must be marked with the country of origin of the decals. Accordingly, the holding in HRL 734052, dated October 17, 1991, also published as C.S.D. 93–1, 27 Cust.Bull 10 (1991) is hereby modified as it pertains to imported decals. However, at the time of importation, the porcelain articles must be marked with their own country of origin as legibly, indelibly, and permanently as the nature of the articles will permit, in such a manner that the marking will survive U.S. processing, and the outermost containers in which the decals are imported must be marked with their country of origin.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

(Slip Op. 97–72)

BÖWE PASSAT REINIGUNGS-UND WÄSCHEREITECHNIK GMBH AND BOEWE-PASSAT DRYCLEANING & LAUNDRY MACHINERY CORP., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 92–01–00058

[Commerce's remand redetermination sustained.]

(Decided June 3, 1997)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr., Ronald A. Oleynik) for Plaintiffs.
Frank W. Hunger, Assistant Attorney General of the United States, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta Melnbrencis);* Of Counsel, *Robert Heilferty,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, Counsel for Defendants.

MEMORANDUM OPINION AND ORDER

POGUE, *Judge:* This matter is before the court for review of the United States Department of Commerce ("Commerce") redetermination ("Remand III") pursuant to remand. *Böwe Passat Reinigungs-und Wäschereitechnik GmbH v. United States*, 951 F. Supp. 231, 240 (CIT 1996)*(Böwe III)*. Several remands have resulted from judicial review of Commerce's final determination in *Drycleaning Machinery from Germany*, 56 Fed. Reg. 66, 838 (Dep't Comm. Dec. 26, 1991) (final results admin. review).[1] The first resulted from *Böwe Passat Reinigungs-und Wäschereitechnik GmbH v. United States*, 17 CIT 335 (1993)*("Böwe I")*, wherein the Court directed Commerce to consider new record evidence[2] in evaluating plaintiffs', ("Böwe's"), claimed circumstance of sale and level of trade adjustments. *Id.* at 343. After reviewing Commerce's first redetermination ("Remand I"), this Court sustained the Department's denial of Böwe's claimed circumstance of sale adjustments as well as three meth-

[1] Familiarity with each of the Court's prior opinions in this case is presumed.

[2] Commerce was ordered to consider Böwe's compendium of documents ("Compendium") which detailed certain expenses that Böwe wanted subtracted from Commerce's calculation of the foreign market value of its dry cleaning machinery, either as "level of trade" or "circumstances of sale" adjustments. *Böwe I* at 343.

odological issues contested during the administrative review. *See Böwe Passat Reinigungs-und Wäschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1151 (CIT 1996)*("Böwe II")*. The Court remanded the issue of Böwe's claimed level of trade adjustments. *Id.* The Court concluded that Commerce had imposed an unreasonable burden of proof on Böwe. *Id.* at 1142–1144. Specifically, the Court concluded that Commerce had effectively required Böwe to produce evidence of sales at different levels of trade in its home market to establish the level of trade adjustment to Commerce's satisfaction. Böwe, however, only sold at the end user level of trade in the home market, and, therefore, could not meet this burden. Such an impossible burden would have been unreasonable, and therefore, not in accordance with law. *See NEC Home Elecs., Ltd. v. United States*, 54 F.3d 736, 745 (Fed. Cir. 1995) (imposing impossible burden represents an abuse of ITA's discretion).

In the second remand redetermination ("Remand II"), Commerce elaborated on the reasons for its denial of the level of trade adjustments. Commerce recognized that requiring actual home market data of sales at two levels of trade was impossible. Remand II at 7. Commerce stated that it was not requiring such evidence of Böwe. *Id.* Instead, Commerce said that the evidence Böwe had submitted in support of its claimed adjustments had "gaps and inconsistencies" that undermined Böwe's claim. Remand II at 8. In reviewing the second redetermination, this Court stated that Commerce's elaboration of the reasons supporting denial of the adjustments "cure[d] the otherwise unreasonable burden of proof," *Böwe III*, 951 F. Supp. at 235; the Court then evaluated whether record evidence supported Commerce's "gaps and inconsistencies" rationale. *Id.* The Court sustained Commerce's denial of level of trade adjustments for four of the five expense categories, finding that the record supported Commerce's conclusion that gaps and inconsistencies undermined the data. *Id.* at 235–238. Nevertheless, in reviewing Commerce's rationale for rejecting the adjustment for order entry and control expenses, the Court interpreted Commerce's stated reasons as still imposing an unreasonable burden on Böwe. *Id.* at 238–240. Accordingly, the Court remanded the issue of the denial of this expense category. *Id.* at 240.

In Remand III Commerce clarified its denial of the level of trade adjustments as follows:[3]

* * * * * *

> With regard to Böwe's OE&C expenses, however, the Court appears to read the Second Remand as indicating that the Department applied a different standard of proof to the OE&C expenses than that applied to the other four categories of expenses. This belief apparently stems from the Department's failure to articulate clearly its conclusions regarding the evidence Böwe supplied to support this claimed adjustment. The Court (and plaintiff) read our

[3] Commerce's redetermination, Remand III, was not published in the Federal Register. The Court, therefore, has quoted the pertinent portions of the results in their entirety.

statements that "no record evidence exists * * * for sales to domestic distributors" concerning the functions of OE&C employees, and that "Böwe has presented no information to indicate that these employee functions would differ for distributor sales," as a *de facto* requirement that Böwe provide actual data on these non-existent home market sales. *See Böwe III* at 17 and 18. However, as the Department made clear later in its Second Remand:

> Böwe's claim for a LOT adjustment did not depend upon Böwe supplying data on home market sales to distributors, as the Department knew * * * that these data are non-existent. Rather, our careful analysis of each of Böwe's LOT claims leads us to conclude * * * that Böwe's claims do not provide the Department with a reliable basis for calculating an adjustment to FMV.

Second Remand at 24.

Our reference to "no evidence" and "no information" on the record concerning "sales to domestic distributors" apparently left the impression that the Department's analysis of Böwe's OE&C expenses focused solely on the domestic market to the exclusion of all other information. Because Böwe had no sales at the distributor level of trade such an analytical approach would foreclose a LOT adjustment for Böwe. Therefore, we did not use such an approach. In fact, we were looking for Böwe to supply worksheets or narrative explanation (as opposed to an unsupported percentage adjustment) which would support Böwe's otherwise unsubstantiated claims and which would permit the Department to perform an independent evaluation of Böwe's LOT claim. The Department examined Böwe's OE&C expenses against the same standard of proof applied to Böwe's other claims: for each, the Department required Böwe to demonstrate that sales to one level of trade in the home market were more costly than sales to the other level of trade in the United States, and to demonstrate that the cost differential was reflected in price.

As we explain further below, our final conclusion regarding this adjustment has not changed: gaps and inconsistencies in Böwe's submissions preclude this adjustment Böwe has not demonstrated adequately that sales *to one level of trade* in the home market are more costly than sales *to the other level of trade* in the United States. The Compendium, upon which Böwe's LOT claims ultimately rely, reflects the number of minutes spent by OE&C employees on "domestic" market sales *versus* "export" sales. While we know that the home market was limited to sales to the end user level of trade, we do not know the levels of trade included in the "export" category, which encompasses more than just the U.S. market. In fact, the "export" market included sales to Australia, Austria, Canada, England, France, Italy, New Zealand, Portugal, Saudi Arabia, the Soviet Union, and Turkey. *See* Questionnaire Response at A–1 through A–4; Supplemental Response at 2. The Compendium provides no further differentiation by country. Moreover, Böwe supplied no data indicating the levels of trade found in these markets. Sales to these countries may have involved end users, distributors, or any number of other distinct levels of trade. The record on this

point is silent. In addition, we have no means of isolating the levels of trade to which Böwe sells, as opposed to other market conditions unique to a specific country, which may account for the significant amount of time spent on home market sales. As one example of these market conditions, in the underlying review Böwe stresses the stringent environmental regulations governing the sale of drycleaning machinery in the home market. *See* Questionnaire Response at A5 and A6; Böwe's October 9, 1991 Case Brief (Case Brief) at 7 through 9; Hearing Transcript at pages 32 through 46. Böwe explains that these regulations are far more burdensome than are similar requirements in the United States, noting that home market customers are required to purchase a separate air-filtering adsorber with each drycleaning machine. *See* Hearing Transcript at 39. It is important to note that there may be other aspects of the home market (more exacting labor or occupational safety regulations, or tax laws, for example) which would increase the administrative burden of Böwe's home market sales: such factors operate independently of levels of trade. Thus, the Compendium, and the entire record, provide no appropriate basis for the comparison of home market and U.S. levels of trade necessary to determine whether Böwe's sales to one level of trade in the home market were more costly than its sales to a different level of trade in the United States. The most we can say is that Böwe has demonstrated that its sales to the home market are more costly (in terms of OE&C labor) than its sales to *export markets generally* (based solely on the gross amount of time OE&C employees devoted to the respective markets).

Further, Böwe has failed to demonstrate to the satisfaction of the Secretary that the claimed LOT adjustment is limited to differences which are "attributable to the different levels of trade, rather than to other factors." *See NTN Bearing Corp. v. United States*, 905 F.Supp. 1083 (CIT 1995). Böwe based its claimed LOT adjustment for OE&C expenses on its unsupported assertion that it incurs additional expenses for "administration of commissions, trade-ins, special discounts and financing, special options, scheduling and paperwork as to installation, technical services, official government reporting, etc." Böwe's March 1, 1991 Questionnaire Response (Questionnaire Response) at B–11. At no time did Böwe provide further explanation of what it meant by this statement. Böwe did assert that distributors would "assume many of the cost elements" which were borne by Böwe in selling to end users in the home market. *See* Böwe's April 29, 1991 Supplemental Questionnaire Response (Supplemental Response) at 3. In its Second Remand the Department attempted to illustrate by example where Böwe's claim lacked support in the evidence of record. Apparently, the Department's choice of language instead conveyed the impression that it had confused the costs of certain commissions, discounts, and so forth with the costs associated with administering these programs. However, it is clear from the evidence submitted by Böwe, including the new information submitted to the Court for the first time in Böwe's August 7, 1996 "Plaintiff's Comments on Remand Determination" (Remand Comments), that the very differ-

ences cited by Böwe in defense of its LOT argument simply do not obtain. The record evidence does not reflect the differences due to costs associated with administering the programs cited by Böwe. Furthermore, certain evidence contradicts Böwe's claims.

For example, Böwe claims that it would incur lower administrative costs for discount programs because it would offer "big, uniform discounts to distributors and a variety of small, sometimes special discounts to end users." *Böwe III* at 20. The record evidence belies this claim. When asked to report its home market discounts (all to end users), Böwe listed only cash discounts for prompt payment. These discounts, "freely offered," were "always available" and were often granted even though the customer paid after the deadline. *See* Questionnaire Response at B–3. As to its U.S. sales to distributors, Böwe reported a single discount rate it routinely offered. Therefore, in comparing the home market end-user discounts to U.S. distributor discounts, we find that Böwe offered a single big discount to the U.S. and a single small discount to the home market. We do not see how the administrative burden and amount of paperwork for these respective arrangements would differ measurably, nor did Böwe submit any evidence of this.

As the Court suggests, the situation with respect to commissions is the same, but supports the opposite conclusion from that urged by Böwe. Böwe reported two commission rates for its sales to end users in the home market and two commission rates for its sales to distributors in the United States. While the commission *rates* are different, we do not have a scintilla of evidence to suggest that the burden of *administering* the respective commission programs would differ at all, as in both cases they involve the same number of options.

With respect to the other activities that Böwe claims would affect its home market selling expenses to distributors, in our Second Remand we noted that Böwe "provided no evidence to support its assertion that it would *not* incur these expenses if it sold to distributors." Second Remand at 15 (original emphasis). As indicated above at page 6, the evidence referred to was, obviously, not evidence from Böwe's home market sales to distributors; we cannot ask Böwe to provide that which never existed. Böwe *did* have data regarding its sales to distributors in the United States and its sales of subject merchandise to distributors in other markets. *See, e.g.*, Case Brief at 6. Böwe may also have possessed data on its sales of other products to distributors in the home market. While we will not speculate here as to the weight the Department would accord specific evidence not before it, Böwe had this evidence at hand, and, from it, Böwe could have fashioned the "worksheets and narrative explanation" lacking in this case. However, Böwe has supplied nothing beyond its unsupported assertions by which we can measure the relevance or impact of these activities upon Böwe's selling expenses at different levels of trade.

Finally, as to Böwe's claim that it would reduce its overall OE&C expenses by 52 percent if it sold to distributors, we note that this Court approved of our rejection of similar unsubstantiated percentage figures offered for advertising and traffic and shipment expen-

ses. Böwe has simply posited, with no further explanation, a LOT adjustment equal to 52 percent of its OE&C expenses. We have no information as to how Böwe calculated this figure, nor has Böwe provided any analysis or worksheets to demonstrate how it arrived at its estimate. It is incumbent upon Böwe to substantiate this claimed adjustment and, in the case of a LOT adjustment, to the claimed adjustment to differences arising from different levels of trade, rather than to other factors. Instead, "Böwe has provided no evidence on the record, either in the form of worksheets or narrative explanation, to substantiate this claim or to explain how it arrived at this 52 percent figure." *Böwe III* at 13, quoting Second Remand at 20. Further, the Department recognizes, as did the Court in *Timken Co. v. United States*, Slip Op. 96–86 (CIT May 31, 1996), the distinction between a respondent's use of methodologies which allocate expenses to different levels of trade and a respondent's actually incurring the expenses differently due to selling to each level of trade. That Böwe was able to devise an allocation methodology which purports to capture the appropriate LOT adjustment for OE&C (as for the other expenses discussed in *Böwe III*) does not indicate, *ipso facto*, that Böwe incurred the expenses differently at different levels of trade. or that the allocation methodology accurately reflects these levels of trade.

As Böwe has provided no evidence (aside from unsupported assertions) indicating what portion, if any, of OE&C expenses are attributable to the fact that Böwe's home market sales were to end users rather than distributors, the Department has no basis for determining the amount of an appropriate LOT adjustment for these expenses.

As in the Second Remand, the Department concludes that, with respect to OE&C expenses. Böwe has substantiated neither its claim that a LOT adjustment is warranted, nor its quantification of such an adjustment. Further, Böwe has not demonstrated that the claimed price differential is wholly or partly attributable to differences in levels of trade. *See* 19 CFR 353.56(a)(1). After thoroughly analyzing the information supplied by Böwe, we must conclude that Böwe has failed to establish that it is the claimed difference in levels of trade which has affected price comparability between Böwe's U.S. and home market sales. We conclude, for the reasons reiterated above, that Böwe's claims do not provide the Department with a reliable basis for calculating a LOT adjustment to FMV. The information supplied by Böwe regarding its OE&C expenses, including the Compendium and the Remand Comments, is both inconsistent in explaining the differences between levels of trade, and incomplete as to quantifying the proposed LOT adjustment. Therefore, the Department is not making a LOT adjustment for Böwe OE&C expanses in this redetermination.

Remand III at 6–13 (footnotes omitted) (emphasis in original).

DISCUSSION

Commerce exercises broad discretion in granting or denying a level of trade adjustment. *Böwe III*, 951 F. Supp. at 233. The breadth of this discretion emanates from Commerce's expertise in administering a com-

plicated statutory scheme. *See Smith Corona Group v. United States*, 1 Fed. Cir (T) 130, 131–32, 713 F.2d 1568, 1571 (1983). As broad as this discretion may be, it is not unlimited. *Böwe III*, 951 F. Supp. at 233. If a party submits evidence to establish a level of trade adjustment, *(e.g.*, the cost data[4] submitted in this case), and Commerce concludes *in a general fashion* that the evidentiary burden has not been met—*i.e.*, the party has not demonstrated to the "satisfaction of the Secretary" that the claimed level of trade adjustment was limited to price differences which are attributable to the different levels of trade—the Court cannot *meaningfully* review Commerce's denial of the adjustment. To enable meaningful judicial review, Commerce must offer a reasoned explanation for its denial of the claimed adjustment.

In this case, Böwe submitted a "Compendium" of data that included, *inter alia*, a comparison of labor hours devoted to certain tasks for home market and export sales. The data indicated that workers expended more labor hours for home market sales than for export sales. Böwe argued that this data documented higher costs which were associated with the home market, and that these higher costs (attributable to the end user level of trade) were reflected in price. It sought an adjustment to account for this difference.

In reviewing Remand I and II the Court, inquiring what else Böwe could have done to substantiate its request, concluded Commerce was imposing an unreasonable burden of proof in denying the adjustment. In Remand II Commerce did not sufficiently articulate the inadequacies of Böwe's order entry and control data. In Remand III, quoted above, Commerce has sufficiently articulated the inadequacies of the data and the Court will sustain Commerce's denial of Böwe's order entry and control expense level of trade adjustment.

In elaborating its denial of the adjustment, Commerce indicated, (with specific references to the record supporting its conclusion), the following deficiencies in Böwe's evidence: it did not sufficiently identify differing levels of trade in export markets; it did not sufficiently discount the impact of other factors (operating independently of levels of trade) that might acount for the price differential; it did not sufficiently detail by worksheets and narrative explanation the costs associated with sales to distributors in the United States and other markets (to prove that certain expenses were not incurred for those sales); and it did not provide the analysis and worksheets for Böwe's claimed percentage adjustment.

Here the Court needed a reasoned explanation for rejection of the claimed adjustment. Commerce provided a reasoned explanation with its "gaps and inconsistencies" rationale. This rationale, in turn, enabled

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[4] "To establish the link between differences in level of trade and differences in price, an econometric analysis need not necessarily be performed. *See Daewoo Elec. Co. v. International Union*, 6 F.3d 1511, 1517 (Fed. Cir. 1993). Use of cost criteria to satisfy the quantum of evidence required to establish entitlement to an adjustment is permissible. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1577 n.26 (Fed. Cir. 1983). Absent evidence that costs do not reflect value, *id.*, Commerce may presume that costs are passed on to consumers. *See Am. Alloys Inc. v. United States*, 30 F.3d 1469, 1475 (1994). Commerce, however, 'is not required to assume such a causal relationship.' *Mantex Inc. v. United States*, 841 F.Supp. 1290, 1302 (1993)." *Böwe III*, 951 F. Supp. at 233–234.

the Court to conduct a meaningful review by assessing whether the record supported Commerce's conclusion.

The record supports Commerce's refusal to make a level of trade adjustment for Böwe's order entry and control expenses. Commerce's determination is not unreasonable and is supported by substantial evidence. Judgment will be entered accordingly.

PUBLIC VERSION

(Slip Op. 97–120)

QUEEN'S FLOWERS DE COLOMBIA, ET. AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FLORAL TRADE COUNCIL, DEFENDANT-INTERVENER

Court No. 96–08–01921

[Commerce's final results of administrative reviews remanded]

(Decided August 25, 1997)

Arnold & Porter, (Michael T. Shor, William L. Busis) for Plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta Melnbrencis,* Assistant Director, *(Karen L. Bland, Jeffrey C. Lowe* and *Sanjay J. Mullick),* Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Lucius B. Lau,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Stewart and Stewart, (Terence P. Stewart, James R. Cannon, Jr., Amy S. Dwyer, Mara M. Burr) for Defendant-Intervener.

OPINION

POGUE, *Judge:* This matter is before the court on the motion of plaintiffs, 20 individual privately-held producers and exporters of fresh cut flowers from Colombia, and three related importers in the United States, for judgment on the agency record, pursuant to U.S. CIT Rule 56.2. Plaintiffs challenge certain aspects of the Department of Commerce's ("Department" or "Commerce") final results of antidumping administrative reviews in *Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. 42,833 (Dep't. Commerce 1996)(final results admin. reviews).

The 20 producers/exporters consist of the following Colombian companies: (1) Queen's Flowers de Colombia Ltda., (2) M.G. Consultores Ltda., (3) Agroindustria del RioFrio Ltda., (4) Cultivos Generales Ltda., (5) Floranova Ltda., (6) Flores Atlas Ltda., (7) Flores Calima S.A., (8) Flores de Bojaca Ltda., (9) Flores del Hato Ltda., (10) Flores el Aljibe S.A., (11) Flores el Cacique Ltda., (12) Flores Canelon Ltda., (13) Flores el Cipres Ltda., (14) Flores el Roble, (15) Flores el Tandil Ltda., (16) Flores Jayvana Ltda., (17) Flores la Mana S.A., (18) Flores la Val-

vanera Ltda., (19) Jardines de Chia Ltda., and (20) Jardines Fredonia Ltda.

The three U.S. importers are: (1) Queen's Flowers Corp., based in Miami, Florida, (2) Atlas Flowers, Inc. d/b/a/Golden Flowers, located in Miami, Florida, and (3) Florexpo, located in Carlsbad, California.

In its Final Results for the consolidated fifth, sixth and seventh administrative reviews of the antidumping order on *Certain Fresh-Cut Flowers From Colombia*, 61 Fed. Reg. 42,833, the Department of Commerce International Trade Administration ("ITA") determined that all 20 flower-producing companies were related, and collapsed them into a single entity called the "Queen's Flowers Group." ITA did not base the dumping margins for this group on data submitted by the companies. Instead, ITA applied a best information available rate ("BIA") of 76.60 percent to all 20 companies for each of the three one-year periods of review, and for future cash deposits. The margins found for other Colombian producers were in the range of 0 to 5 percent.

BACKGROUND

Following investigations by the Department of Commerce and the U.S. International Trade Commission, an antidumping duty order was entered against Certain Fresh Cut Flowers From Colombia in 1987. That antidumping duty order covered standard carnations, miniature carnations, standard chrysanthemums, and pompom chrysanthemums. *See Certain Fresh Cut Flowers From Colombia*, 52 Fed. Reg. 6492 (Mar. 18, 1987) (amend. final determ.).

Prior to the August 19, 1996 publication of the final results in the consolidated fifth, sixth, and seventh administrative reviews of the *Fresh Cut Flowers From Colombia* antidumping duty order, covering entries made between March 1, 1991 and February 28, 1994, plaintiffs' exports to the United States were subject to antidumping duty deposit rates ranging between 0% and 3.13%.

Nine of the twenty plaintiff producers were included within Commerce's Notices of Initiation for the fifth, sixth, or seventh administrative reviews, which initiated administrative reviews for several hundred Colombian producers/exporters of subject merchandise. These nine companies were: (1) Queen's Flowers de Colombia Ltda., (2) Jardines de Chia Ltda., (3) Jardines Fredonia Ltda., (4) Agroindustria del RioFrio Ltda., (5) Flores Canelon Ltda., (6) Flores del Hato Ltda., (7) Flores la Valvanera Ltda., (8) M.G. Consultores Ltda., and (9) Cultivos Generales Ltda. (previously Flores Generales). Cultivos Generales and Fredonia, however, certified that they did not produce or export subject merchandise to the United States during the periods of review. No review was re-

quested for the remaining 11 companies, and thus none were included in any of ITA's three notices of initiation.[1]

In the preliminary results issued on June 8, 1995, ITA determined to collapse eight of the original producer plaintiffs into one entity, the Queens's Flower Group. All of the plaintiff producers in Commerce's Notices of Initiation were included except Cultivos Generales. Although all the companies provided responses to ITA's initial questionnaire and supplemental questionnaires, ITA preliminarily determined that these respondents had impeded its investigation, and applied a first-tier best information available ("BIA") rate to the eight companies. First-tier BIA is the most adverse BIA level and is applied to companies that refuse to cooperate with Commerce's requests for information or significantly impede an administrative review. *See Allied-Signal Aerospace Co. v. United States*, 996 F. 2d 1185 (Fed. Cir. 1993). This rate, equal to the highest rate ever determined for any producer in any review, was 75.92 percent for the fifth administrative review period, and 83.61 percent for the sixth and seventh administrative review periods. *Certain Fresh Cut Flowers From Colombia*, 60 Fed. Reg. 30270, 30272–73 (Dep't. Commerce, 1995) (prelim. results admin. review).

Previously, Commerce had delivered a November 17, 1994, decision memorandum to the eight companies explaining why the companies were collapsed, and a December 5, 1994, analysis memorandum itemizing deficiencies in their questionnaire responses which, according to Commerce, justified the use of BIA.

On May 26, 1995, ITA issued Section A questionnaires covering all three review periods to the 12 producer plaintiffs not covered in the preliminary determination. It issued supplemental questionnaires to these companies on July 21, 1995. Timely responses were provided by all companies. On August 3, 1995 the ITA issued a decision memorandum analyzing the relatedness of the original eight parties. That memorandum determined that the companies were related. On February 1, 1996, the ITA issued a memorandum analyzing the relatedness of the twelve other companies[2] to the earlier eight. That memorandum determined that all twenty companies were related.

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[1] Queens Flowers argues that since no review was requested for 11 of the producer plaintiffs, and since these 11 were not included in ITA's notice of initiation, these 11 producers were improperly included within the scope of these administrative reviews. The Court does not agree. In *UCF American Inc. v. United States*, 870 F. Supp. 1120 (CIT 1994), Commerce included in an administrative review Chinese exporters for whom no review had been requested and who had not been included in Commerce's notice of initiation. The court found that "the statute imposes no burden on Commerce with regard to the form of Commerce's response to requests for annual reviews, other than the requirement that Commerce publish a notice in the Federal Register announcing that a review will be undertaken." *Id.* at 1125. Furthermore, the court found that the domestic producer that requested the review had complied with the applicable regulation and with the "spirit" of the statute in enumerating specific companies for review. Finally, the court said that since the contested companies received questionnaires prior to the Preliminary Results, allowing Commerce to clarify the scope of review in the Preliminary Results, the contested companies had adequate notice that they would be included in the administrative review. *Id.* at 1126. Similarly, in this case, Commerce sent Section A questionnaires to the additional 11 respondents prior to publication of the preliminary results and explained in the Preliminary Results that "we believe that there are an additional 12 companies with strong ties to the Queen's Flowers Group. We are giving these 12 companies an opportunity to respond to our questionnaire * * *. If * * * we conclude that any or all of these companies are significantly related to the Queen's Flowers Group to be considered to be one entity, the rates for the group will apply to these companies as well." *Certain Fresh Cut Flowers From Colombia*, 60 Fed. Reg. 30,270, 20,273 (Dep't. Commerce 1995). Because all parties had sufficient notice and an opportunity to respond, the Court concludes that the contested parties were appropriately included within the scope of Commerce's investigation.

[2] The companies analyzed were: Flores Jayvana, Flores el Cacique, Flores Calima, Flores la Mana, Flores el Cipres, Flores el Roble, Flores del Bojaca, Flores el Tandil, Flores el Aljibe, Flores Atlas, Floranova, and Cultivos Generales.

On June 28, 1996, the ITA issued a memorandum in response to comments raised about the use of BIA for the Queen's Flowers Group. This memorandum focused in large measure on the failure of the companies to provide related party information in their responses to questionnaires.

The Plaintiffs, Queen's Flowers Group, et. al., argue that the twenty companies were unlawfully collapsed, and that BIA was applied to the companies unlawfully because the companies gave complete responses to the questionnaires.

DISCUSSION

I. Collapsing Parties

Plaintiffs argue that Commerce does not have the legal authority to collapse 20 companies and treat them as a single entity. (Pls.' Br. Supp. Rule 56.2 Mot. J. Agency R. [hereinafter Pls.' Brief] at 21). Specifically, Plaintiffs argue, ITA has no statutory authority to collapse multiple producers or exporters.

"If the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984). Commerce acknowledges that "[i]t is the Department's long standing practice to calculate a separate dumping margin for each manufacturer or exporter investigated." Final Results, 61 Fed. Reg. at 42,853. However, the statute itself does not require that Commerce calculate company-specific margins, *see Certain Granite Products from Italy*, 53 Fed. Reg. 27,187, 27,189 (Dep't. Commerce 1988)(final determ.); nor does it contain a standard for Commerce to apply in determining what constitutes a "company" for purposes of the antidumping law. In this case Commerce's decision to define "company" to include several closely related companies is a permissible application of the statute. Commerce treats closely related parties as a single entity in order to "ensure that [Commerce] reviews the entire producer or reseller, not merely a part of it." Final Results at 42,853. Commerce's authority to ignore the separate legal existence of some parties for purposes of calculating dumping margins arises out of the "basic purpose of the statute—determining current margins as accurately as possible," *Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 67, 899 F.2d 1185, 1191 (1990), as well as the Department's responsibility to prevent circumvention of the antidumping law. *See Mitsubishi Electric Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988) ("The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] * * * with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."), *aff'd* 8 Fed. Cir. (T) 45, 898 F.2d 1577 (1990).

The statute contains several provisions that permit or require Commerce to ignore transactions between related buyers and sellers in the

home market or to treat a related exporter and importer as a single entity in order to prevent price or production manipulation. *See, e.g.*, 19 U.S.C. § 1677b(c) (1988) (permitting Commerce to ignore transactions in a nonmarket economy country (a country that does not operate on market principles of cost or pricing structures) and calculate a single foreign market value for all producers or exporters), 1677b(e) (1988) ("For the purposes of [calculating constructed value] a transaction directly or indirectly between [related parties] may be disregarded * * *."); *see also Nacco Materials Handling Group Inc. v. United States*, Slip Op. 97–99 (CIT July 15, 1997)(finding Commerce's decision to treat an exporter, its related United States importer and a wholly owned subsidiary of the importer as a single entity in calculating United States Price, pursuant to 19 U.S.C. § 1677(13)(c) to be in accordance with law.).

This court has twice implicitly endorsed Commerce's authority to collapse related foreign producers in appropriate circumstances. In *FAG Kugelfischer v. United States*, 932 F. Supp. 315 (CIT 1996), the court listed the factors to be considered by Commerce when deciding whether companies should be collapsed. Ultimately the court overturned Commerce's decision to collapse based on its finding that Commerce had not adequately considered all of the factors. *Id.* at 324. Similarly, in *Nihon Cement Co., Ltd. v. United States*, 17 CIT 400, (1993), the court overturned Commerce's collapsing determination because Commerce's determination failed to include any discussion or evidence regarding the collapsing criteria. "While each of [the] criteria did not have to be met, Commerce did have to consider them all." *Id.* at 426. In neither case did the court question Commerce's authority to collapse parties if the collapsing criteria were met.

II. COMMERCE'S USE OF § 1677(13) TO DEFINE RELATED PARTIES

"In prior cases involving collapsing, the Department has stated that it will only collapse parties that are related to each other * * *. In recent proceedings, the Department has refined this practice by noting that it only collapses parties that are related within the meaning of Section 771(13) of the Tariff Act [19 U.S.C. § 1677(13)]." (Mem. from Michael F. Panfeld to Holly A. Kuga, Aug. 3, 1995 (citing *Fresh Cut Roses from Ecuador*, 60 Fed. Reg. 7019, 7040 (Dep't. Commerce 1995)(fin. determ.); *Disposable Pocket Lighters from Thailand*, 60 Fed. Reg. 14,263, 14,268 (Dep't. Commerce 1995)(fin. determ. and fin. negative critical circumstances determ.))).

Section 1677(13) provides as follows:

> For the purpose of determining United States price, the term "exporter" includes the person by whom or for whose account the merchandise is imported into the United States if—
>
> (A) such person is the agent or principal of the exporter, manufacturer, or producer;
>
> (B) such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer;

> (C) the exporter, manufacturer, or producer owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in any business conducted by such person; or
>
> (D) any person or persons, jointly or severally, directly or indirectly, through stock ownership or control or otherwise, own or control in the aggregate 20 percent or more of the voting power or control in the business carried on by the person by whom or for whose account the merchandise is imported into the United States, and also 20 percent or more of such power or control in the business of the exporter, manufacturer, or producer.

19 U.S.C. § 1677(13) (1988). Plaintiffs argue that Commerce should have used the related party definition found at 19 U.S.C. § 1677b(e)(4). This definition applies when Commerce is calculating constructed value.[3] Section 1677b(e) requires that under specified circumstances Commerce is to ignore transactions involving inputs to the manufacture of the subject merchandise when the transactions are between related parties. *See* 19 U.S.C. § 1677b(e)(2) &(3) (1988). The term "related parties" is defined to include:

> (A) Members of a family, including brothers and sisters * * *, spouse, ancestors, and lineal descendants.
>
> (B) Any officer or director of an organization and such organization.
>
> (C) Partners.
>
> (D) Employer and employee.
>
> (E) Any person directly or indirectly owning, controlling or holding with power to vote 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

19 U.S.C. § 1677b(e)(4) (1988). Plaintiffs argue that this related-party definition is more restrictive and therefore more appropriate in identifying situations "'where the type and degree of relationship is *so significant* that * * * there is a *strong* possibility of price manipulation.'" (Pls.' Br. at 35 (quoting *Nihon Cement*, 17 CIT at 425)).

However, the definition relied on by Commerce in this case is the more generally applicable of the two related party definitions. Section 1677(13) is used by Commerce to define the identity of the exporter when calculating United States price.[4] The section is also used to determine whether home market sales are between related companies for purposes of calculating foreign market value. *See* 19 U.S.C. § 1677b(a)(3) (1988) ("If such or similar merchandise is sold * * * through a sales agency or other organization related to the seller in any

[3] Normally foreign market value is based on sales in the producer's home country, or a third country. However, if home and third-country market sales are found to be inadequate for determining foreign market value, Commerce bases foreign market value on the constructed value of the subject merchandise. 19 U.S.C. § 1677b(a)(1) and (2) (1988).

[4] Specifically, Section 1677(13) is used to determine whether the importer in the United States is related to the foreign exporter, and whether to use exporter's sales price or purchase price in calculating United States price. Purchase price, the price paid by the U.S. importer to the foreign exporter or manufacturer is used when the exporter or manufacturer and importer are unrelated. *See* 19 U.S.C. § 1677a(b). Exporter's sales price, the price at which the merchandise is sold in the United States to an unrelated purchaser, is used when the exporter and importer are related. *See* 19 U.S.C. § 1677a(c).

of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold * * * by such sales agency * * * may be used in determining the foreign market value."). Finally, under 19 C.F.R. § 353.45(a), Commerce is required to disregard sales of subject merchandise between related parties, as defined under section 1677(13), unless Commerce is satisfied that the sales were made at arm's length. *See Ansaldo Componenti S.p.A. v. United States*, 10 CIT 28, 35, 628 F. Supp. 198, 204 (1986) ("ITA has relied on § 1677(13) to determine whether companies in the home market are related parties in choosing whether to rely on home market sales to calculate FMV.").

The related party definition found at section 1677b(e)(4), on the other hand, applies only when the agency is using constructed value to calculate FMV, and only to transactions involving inputs to the production process in the computation of constructed value.

The statute does not include a provision for collapsing related producer/exporters; therefore, it also does not mandate a particular definition of related parties to be used in making a collapsing determination. In the absence of such a provision, Commerce's decision to rely on section 1677(13), the more generally applicable related parties definition, was a reasonable interpretation of the statute. "In a situation where Congress has not provided clear guidance on an issue, *Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994).

Plaintiffs also argue that the use of Section 1677(13) in this case violated 19 U.S.C. § 1677b(e)(2) because Commerce used constructed value as the basis for FMV. Under 19 U.S.C. § 1677b(e)(2), Commerce may ignore intercompany transactions only if the companies are related as this term is defined in section 1677b(e)(4). By collapsing parties related according to the definition in section 1677(13), Plaintiffs argue, Commerce ignored transactions between companies that may not have been related under section 1677b(e)(4). However, Commerce's collapsing analysis and its constructed value calculation are separate. If Plaintiffs believe that Commerce erroneously ignored certain transactions in calculating constructed value they should have cited to record evidence of that error.

III. Commerce's Determination that the Members of the Queens Flowers Group are Related

Plaintiffs argue that even if Section 1677(13) provides the proper related party test, Commerce's determination that all 20 companies within the Queens flowers group were related was not supported by substantial evidence on the record. *See* 19 U.S.C. § 1516a(b)(1)(B)(I) (1988).

When examining Commerce's factual determinations to decide whether they are supported by substantial evidence, the court must determine whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's]

conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 216 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951)*(quoted in Matsushita Comm. Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984)).

Commerce's "related parties" analysis divides the group into two subgroups, the A Group and the B Group. *See* Mem. from Michael F. Panfeld to Holly A. Kuga, (Feb. 1, 1996). MG Consultores (MG) is the "hub" of the A Group. Def.'s Mem. Opp. Pls.' Mot. J. Agency R. at 42. MG owns at least a 20 percent share of six companies. Commerce defines "any interest" to mean no less than a five-percent ownership interest. Therefore, each of these companies is related to MG according to section 771(13)(B). Furthermore, the companies are related to each other according to the terms of 771(13)(D).

Mr. "X" owns 25 percent of MG. Mr. X also owns 33 percent of Company "Z", so MG and Company Z are related under 771(13)(D), and Mr. X owns 10 percent of Company "Y", so Mr. X and Company Y are related pursuant to 771(13)(B). However, according to the terms of Section 1677(13), Company Z and Company Y are not related to the remaining members of the subgroup. None of the other subgroup members have any ownership interest in either Z or Y, and Z and Y have no ownership interest in any of the other A Group members. Furthermore, there is no person or persons who owns directly or indirectly at least 20 percent of both Z or Y and the other members of the A Group. Mr. X's indirect ownership interests in the other A Group companies, through his interest in MG Consultores, are less than 20 percent.

Defendant argues that the fact that MG Consultores is related to its subsidiaries and that Company Z is related to MG Consultores provides a legal basis to conclude that Z is related to MG Consultores' subsidiaries. "The rationale is simple," Defendant explains, "MG Consultores and its subsidiaries had a parent-subsidiary relationship. As such, they were collapsed and treated as a single enterprise for purposes of establishing their entire relationship with other parties under section 771(13)." Def.'s Mem. Opp'n Plts.' Mot. J. Agency R. at 45. However, Commerce never made this argument on the record. "The courts may not accept * * * counsel's post hoc rationalizations for agency action; * * * an agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself * * *." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69, 83 S. Ct. 239, 246 (1962). Finally, Commerce did not explain its determination that Company Y, which was not related to MG Consultores,[5] was related to the remaining members of the A group.

Commerce also argues that non-financial factors support its finding that Company Z was related to the other members of the A Group. This argument is inconsistent with Commerce's Final Determination in *Fresh Cut Roses from Ecuador*, 60 Fed. Reg. 7019, 7040 (Dep't. Com-

[5] Mr. X owned only a 10 percent interest in Company Y. Therefore, Company Y was not related to MG Consultores under 19 U.S.C. § 1677(13)(D).

merce 1995) (final determ.). In that case, Commerce refused to collapse parties, explaining,

> Petitioner's arguments concerning interlocking shareholders, shifting of production, possibility of price manipulation, and control of production and sales, are inapposite because they are related to factors that the Department considers in determining whether to collapse companies for the purpose of calculating a single dumping margin. * * * Significantly, however, a collapsing analysis is only done on related parties * * * In most cases, the relatedness of the parties is quite clear, i.e., a parent and a subsidiary, or two sister subsidiaries. * * * In contrast, in this investigation there is no evidence that, pursuant to the definition of related parties under section 771(13) of the Act, respondent and company X are related. As a result, we have not performed a collapsing analysis.

Id.; see also Disposable Pocket Lighters from Thailand, 60 Fed. Reg. 14,263 (Dep't. Commerce 1995)(final determ. and final neg. critical circumstances determ.)(refusing to collapse two parties because one had no ownership interest in the other and therefore the two were not related under section 771(13)).

It is "a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure * * *. This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of a statute." *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp 1075 (1988); *see also Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 418 (CIT 1993). The rule also assures that an administrative agency will be "faithful and not indifferent to the rule of law," *Columbia Broad. System, Inc. v. FCC*, 147 U.S. App. D.C. 175, 183, 454 F.2d 1018, 1026 (1971), and "prohibit[s] the agency from adopting significantly inconsistent policies that result in the creation of 'conflicting lines of precedent governing the identical situation.'" *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)(quoting *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 3 (1st Cir. 1987). Commerce has the flexibility to change its position providing that it explain the basis for its change[6] and providing that the explanation is in accordance with law and supported by substantial evidence.[7] Commerce gave no explanation

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[6] "The underlying ground of that principle is that the reviewing court should be able to understand the basis of the agency's action and so may judge the consistency of that action with the agency's general mandate. *Chennault v. Department of Navy*, 796 F.2d 465, 467 (Fed. Cir. 1986). "This is not to say that an agency, once it has announced a precedent, must forever hew to it. Experience is often the best teacher, and agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in the light of new insights and changed circumstances. However, the law demands a certain orderliness. If an administrative agency decides to depart significantly from its own precedent, it must confront the issue squarely and explain why the departure is reasonable." *Davila-Bardales*, 27 F.3d at 5.

[7] The court's review of an agency's change of position or practice will typically center on whether the action was arbitrary. A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence. Apart from factual findings, agency arbitrariness may also manifest itself in the particular reasoning offered by the agency; principally, if the reasoning is inconsistent with the statutory mandate, or, to a lesser extent, if the reasoning (or lack thereof) violates general principles of administrative law, *see, e.g., Hussey Copper, Ltd. v United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) or offends standards of procedural fairness implied in the statute. *See, e.g., Hussey Copper, Ltd. v. United States*, 18 CIT 454, 457–458, 852 F. Supp. 1116, 1120 (1994); *Shikoku Chem. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421–422 (1992). In this context the court reviews an agency change of position or practice to insure it is "in accordance with law."

for its departure from its position in *Roses* and *Pocket Lighters*. In fact, Commerce did not acknowledge that an inconsistency exists between those cases and the determination here.

Commerce cites *Sugiyama Chain v. United States*, 18 CIT 423, 852 F. Supp. 1103 (1994) for the proposition that "Commerce may properly consider 'both financial and/or non-financial connections' when assessing whether parties are related within the meaning of 19 U.S.C. § 1677(13)(C)." *Id.* at 433, 852 F. Supp. at 1112 (quoting *E.I. Dupont De Nemours & Co. v. United States*, 17 CIT 1266, 1280, 841 F. Supp. 1237, 1248 (1993)). However those cases were decided prior to the *Roses* and *Pocket Lighters* determinations and therefore cannot explain Commerce's departure from prior agency practice.

The second subgroup, the B Group is comprised of 14 individual companies. Commerce based its relatedness determination for this group primarily on the ownership interests of Shareholder "J" and his brother. Shareholder J owns more than 20 percent of 12 of these companies. Therefore these 12 companies are related pursuant to 771(13)(D). The brother owns at least 20 percent of three companies, so these three are related to one another pursuant to 771(13)(D). Furthermore, Commerce's finding that these three were related to the other B Group companies was reasonable. The statute requires that "any person or persons" own or control, "jointly or severally, directly or indirectly, * * * 20 percent or more of the voting power or control in the business of each party." Commerce's decision to aggregate the interests of two brothers, both producing the same product, with common interests in several businesses, was a reasonable application of the statute. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445 (1978) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain [an agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.").

After deciding that the members of each sub-group were related, Commerce collapsed each sub-group into a single entity and then decided that each sub-group constituted a "person" under Commerce regulations, and that the two sub-groups are related within the meaning of 1677(13). (Second Collapsing Memo. at 4–5).

Commerce's related parties analysis includes both common ownership interests between the two groups and non-financial factors. *See Mem. from Michael F. Panfeld to Holly A. Kuga re: Collapsing Related Parties within the Queen's Flowers Group* (Feb. 1, 1996) [hereinafter *February Mem.*]. However, as the Court explained above, Commerce's analysis of non-financial factors in its related parties analysis is inconsistent with previous agency decisions. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and stan-

dards are being deliberately changed, not casually ignored. * * *" *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied* 403 U.S. 921 (1971).

A second flaw in Commerce's analysis is that "Commerce did not identify [on the record] the relevant provisions under section 771(13) supporting the determination that the two subgroups, as legal 'persons' were related."[8] (Def.'s Mem. Opp'n. Pls.' Mot. J. Agency R. at 61). Therefore the Court is remanding this issue to Commerce for reconsideration. The agency must identify which provisions of the statute it relied on in making the related parties determination and "must articulate [a] rational connection between the facts found and the choice made." *Nihon Cement Co. v. United States*, 17 CIT 400, 426 (1993) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). In other words, Commerce must explain how its factual findings support its determination that the Queens Flowers subgroups were related.[9]

IV. The Remaining Collapsing Factors

After reconsidering its relatedness determination, Commerce must also reevaluate its analysis of the remaining collapsing factors. The court in *Nihon*, described the collapsing analysis as follows:

> In determining whether to collapse entities, Commerce does not focus solely upon the degree of voting control one company may have over another, but upon a broad analysis of the facts in the case * * *. Other factors relied upon by Commerce in collapsing related companies are that (1) the companies are closely intertwined; (2) transactions take place between the companies; (3) the companies have similar types of production equipment, such that it would be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions * * *. All of these factors need not be present as long as the parties are sufficiently related to present the possibility of price manipulation.

17 CIT at 425.

In the Final Determination in this case, Commerce stated,

> To determine whether companies should be collapsed, the Department makes three inquiries. First, the Department examines whether the companies in question are related * * *. Second, the Department examines whether the companies in question have similar production facilities, such that retooling would not be re-

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[8] In its memorandum to this Court, Commerce argues that "[b]oth subsections (B) and (D) support Commerce's determination." *Def.'s Mem. Opp'n. Pls.' Motion J. Agency R.* at 60–62. This argument is simply a post hoc rationalization by government counsel.

[9] The common ownership interests listed by Commerce consist of the following:

1. Both Mr. X and Shareholder J have ownership interests in four companies.
2. Shareholder "K" has interests in three companies from the A Group and six companies from the B Group.
3. Shareholder "L" owns minority shares of two of the overlap companies and several B Group companies.

The remaining ownership interests listed by Commerce are primarily interests in members of one subgroup or the other and therefore do not support a finding of relatedness between the two subgroups. *See February Mem.* at 5–6 n. 1.

Until Commerce tells the Court the legal standard on which it is relying to make its related parties determination, the Court cannot evaluate whether Commerce's determination is supported by substantial evidence.

> quired to shift production from one company to another * * *. Third, the department examines whether there exists other evidence indicating a significant potential for the manipulation of price or production. The types of factors the Department examines include: (1) The level of common ownership; (2) the existence of interlocking officers or directors * * *; and (3) the existence of intertwined operations.

61 Fed. Reg. at 42,853 (Cmt. 26).

Although the factors listed by the Department in the Final Determination are not identical to those listed in *Nihon*, the Department has articulated a reasonable set of inquiries for answering the central question, whether parties are sufficiently related to present the possibility of price manipulation. Therefore, the Court finds Commerce's articulation of collapsing factors in the final determination to be in accordance with law.

However, Commerce appears to have relied on a different set of collapsing factors in its November 17, 1994 Collapsing Memorandum. It is not clear to the Court which set of factors formed the basis of Commerce's collapsing determination. "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S. Ct. 454, 462 (1943). Therefore, upon remand, Commerce should explain to the Court which set of factors it is relying on to make its collapsing determination. Only then can the Court review whether Commerce's determination was supported by substantial evidence.

V. Application of BIA

Defendant's BIA determination here was based in part on its determination that the Queen's Flowers companies are related, and on the failure of some members of the group to provide related party information. Therefore, after reevaluating its related parties determination, Commerce must also reconsider its decision to rely on BIA in calculating the group's dumping margin.

On remand, Commerce should also address the flaws in its BIA analysis identified by the Court in the preliminary injunction. *Queens Flowers de Colombia v. United States*, 947 F. Supp. 503, 507–08 (1996)

One of the primary deficiencies relied upon by Commerce in its BIA analysis was the failure of the original eight group members to provide complete shareholder information for other companies that did not produce the subject merchandise. Plaintiffs pointed out to the court, however, that the first two questionnaires did not request that information. The first section A questionnaire stated, inter alia:

> * * * Provide the names and addresses of all related companies that *deal with the products involved* in this review* * *

(Tab 14, Appendix III of Pl. Motion)(emphasis added). Section A of the supplemental questionnaire dated July 22, 1994, asked, inter alia:

> Is any member of your Board of Directors or any stockholder, whether directly or indirectly (through a holding company, subsidiary company or parent company), also a stockholder or member of the Board of Directors of any other producer, reseller, bouquet converter, or U.S. importer *of the subject merchandise*? If so, fully disclose all relationships and give full ownership information for those companies.

(Emphasis added). These early questionnaires demonstrate that the ITA did not request complete shareholder information for companies that did not produce the subject merchandise. And yet, the failure of the original companies to provide that information led ITA in part to use BIA against all 20 firms. The problem with ITA's action is that the alleged response deficiency cannot support application of BIA where the information sought was apparently never requested. *See Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572–75 (Fed. Cir. 1990) ("To avoid the threat of [application of BIA], a submitter need only provide complete answers to the questions presented in an information request.").

Moreover, it appears that when the ITA specifically requested complete shareholder information about the companies that did not produce the subject merchandise, the information was provided. In correspondence dated, May 26, 1995 addressed to plaintiffs' counsel from the ITA, the ITA specifically asked for the information. (Tab 16, Appendix III Pl. Motion Papers). The producers provided detailed responses which the ITA received on June 13 and June 22 of 1995. (Tabs 17–22, Appendix III Pl. Motion Papers). The May 26, 1995 request came just two weeks before the preliminary results were published on June 8, 1995. The responses were received after that date, but within a reasonable time period given the nature of the information requested. It appears that the ITA had all of plaintiffs related party information by June 22, 1995, fully one year before the issuance of its final results.

A second deficiency relied on by ITA in its BIA analysis memorandum dated June 28, 1996, was that Cultivos Generales failed to respond to the Department's initial questionnaire in the seventh review. At the hearing on the preliminary injunction, it became apparent that the ITA had sent the questionnaire to the wrong address, and that Cultivos Generales had not received it. Application of BIA on the ground that Cultivos did not respond is therefore unwarranted.

Finally, some of the deficiencies may have resulted from Commerce's own mistakes. Specifically, the deficiencies in Flores del Hato's response to Commerce's September 6, 1994 supplemental questionnaire may have been caused by the fact that Hato received a questionnaire meant for Agroindustria del RioFrio

Commerce's decision to use first-tier BIA was also not adequately explained on the record. According to the statute, "[i]n making their deter-

minations * * * the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988).

Congress "did not explicitly define what type of information constituted the 'best' information. Hence, because Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference. *Allied-Signal Aerospace Co. v. U.S.*, 996 F.2d 1185, 1191 (Fed. Cir. 1993). In *Allied Signal* the court approved a BIA scheme in which the ITA selects first-tier BIA when a respondent refuses to cooperate with its requests for information or significantly impedes the administrative review, and second-tier BIA, which is less adverse, when a respondent substantially cooperates but still fails to provide requested information in a timely manner or in the required form. *Id.* at 1190–91.

Although it approved the ITA's two-tier methodology, the *Allied Signal* court found that ITA's application of its methodology was in error. ITA had applied first-tier BIA to a respondent that failed to respond to sections B, C, or D of Commerce's questionnaire. The court found that the respondent's failure to complete the questionnaire did not constitute a refusal to cooperate. "[The respondent] failed to provide a complete response to the requested information because it was unable to, not because it refused to." *See also Usinor Sacilor v. United States*, 18 CIT 1155, 872 F. Supp. 1000, 1007 (1994) (ordering Commerce to determine whether the insufficiency of respondent's questionnaire response was due to respondent's inability to obtain the information before applying first-tier BIA). Thus, in order to apply first-tier BIA, Commerce must produce substantial evidence that respondents refused to cooperate or significantly impeded its review. *See* 19 U.S.C. § 1516a(b)(1)(B)(1).

In the Final Determination here, Commerce stated "that the Queen's Flowers Group impeded our investigation and [we] consider the group to be uncooperative. Therefore, we are assigning the Queen's Flowers Group a first-tier BIA * * *." Final Deter. at 42,855. While Commerce provided the Court with a list of deficiencies in the Queens Flowers Group members' questionnaire responses, Commerce did not identify for the Court the evidence that the deficiencies were due to a refusal to cooperate. The Court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286, 95 S. Ct. 438, 441 (1974). However, "the agency must examine the relevant data and articulate a satisfactory explanation for its action * * *." *Motor Vehicle Manu. Assn. of U.S. v. State Farm Mutual Auto. Ins. Comp.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983). Upon remand, Commerce must recon-

sider its choice of BIA and explain to the Court the findings supporting its decision.

CONCLUSION

In accordance with the foregoing, it is hereby **ORDERED** that Commerce's Final Results of its Administrative Review is remanded for Commerce to reconsider its determination that the 20 Queens Flowers companies are related parties. In light of its reconsideration, Commerce should also reconsider its decision to collapse all 20 companies into a single entity for purposes of calculating a dumping margin, and both the decision to resort to BIA and the use of first-tier BIA in calculating Plaintiffs' dumping margin. Commerce shall complete its remand determination by **November 4, 1997**. Any comments or responses are due by **January 13, 1998**. Any rebuttal comments are due by **January 28, 1998**.[10]

PUBLIC VERSION

(Slip Op. 97–124)

GULF STATES TUBE DIVISION OF QUANEX CORP., PLAINTIFF *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND DALMINE S.P.A., DALMINE USA INC., AND TAD USA, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 95–09–01125

[Remanded in part.]

(Decided August 29, 1997)

Schagrin Associates, Roger B. Schagrin, R. Alan Luberda, and *John C. Steinberger,* Washington, DC, for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Velta A. Melnbrencis,* U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Boguslawa B. Thoemmes,* Of Counsel, Office of the Chief Counsel for Import Administration, for Defendant.

Rogers & Wells, William Silverman and *Ryan Trainer,* Washington, DC, for Defendant-Intervenors.

MEMORANDUM AND ORDER

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* Plaintiff, Gulf States Tube Division of Quanex Corporation ("Quanex"), and Defendant-Intervenors[1] Dalmine S.p.A., Dal-

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[10] The parties filed extensive briefs in this matter. Accordingly, Plaintiffs' motion for oral argument is hereby denied.

[1] This case was consolidated. As a result, Defendant-Intervenors are also Plaintiffs on certain issues.

mine USA Inc., and TAD USA, Inc. (collectively "Dalmine"), contest certain aspects of the Department of Commerce, International Trade Administration's ("ITA" or "Commerce") Final Determination in *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 31,981 (June 19, 1995) ("Final Determination"), as unsupported by substantial evidence and contrary to law. This Court has jurisdiction under 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

Quanex argues that four actions by Commerce were unsupported by substantial evidence on the record and not in accordance with law: (1) the exclusion of certain U.S. sales of subject merchandise from its antidumping calculations; (2) the failure to use best information available ("BIA") to calculate margins for certain unreported U.S. sales; (3) the failure to apply adverse BIA to calculate margins for certain unreported U.S. sales; and (4) the failure to explain its decision to exclude the unreported U.S. sales from the margin calculation.

Dalmine argues that six actions by Commerce were unsupported by substantial evidence on the record and not in accordance with law: (1) the application of adverse BIA as a result of Dalmine's omission of a single sale from its outlier request; (2) the initiation of a below-cost-of-production investigation of Dalmine's home market sales; (3) the calculations of cost of production ("COP") and constructed value ("CV") with respect to Dalmine's galvanized products; (4) the attribution of Instituto per La Riconstruzione Industriale S.p.A.'s ("IRI") interest expenses to Dalmine because IRI is Dalmine's ultimate parent; (5) the reduction of IRI's interest expenses by short-term interest income only; and (6) the rejection as "new" information of certain documents that Dalmine submitted with their Reply Brief during the administrative proceeding.

Dalmine has abandoned its claims that Commerce erred in not reducing Dalmine's general expenses by Dalmine's exchange gains, and that Commerce understated the "CV offset ratio" because it excluded certain categories of accounts receivable from related companies.

For the reasons discussed below, the Court remands to Commerce only on the issue of the calculation of COP and CV with respect to Dalmine's galvanized products. The Court affirms Commerce's actions on all other issues.

II

Procedural Background[2]

On June 23, 1994, Quanex filed a petition with Commerce requesting an antidumping investigation of seamless pipe from Italy. Petition from Schagrin Assoc. to Sec. of Commerce ("Petition"), Administrative Record ("AR") Pub. Doc. 1, Fiche 2–3, Fr. 1. Quanex alleged that seamless pipe was being, or was likely to be, sold in the United States at less than

[2] Because this case involves many issues, the specific facts involving each issue will be discussed separately.

fair value, within the meaning of section 731 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673 (1988).

The ITA initiated an antidumping investigation on July 13, 1994, published in Federal Register on July 20, 1994.[3] *Initiation of Antidumping Duty Investigations: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina, Brazil, Germany and Italy*, 59 Fed. Reg. 37,025 ("Initiation Notice").

Commerce issued a preliminary negative determination on January 27, 1995. *Notice of Preliminary Determination of Sales at Not Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 5358 ("Preliminary Determination"). In the *Final Determination*, however, Commerce determined that Dalmine's weighted-average dumping margin was 1.84 percent. 60 Fed. Reg. at 31,992. Dalmine and Quanex challenge certain aspects of Commerce's Final Determination.

III

DISCUSSION

A

Standard of Review

In reviewing a final ITA determination, this Court will "hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence 'is something less than the weighing of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative agency's finding from being supported by substantial evidence.'" *Matsushita Elec. Indus. Co. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966)).

In reviewing an agency's construction of the statute that the agency administers, the Court's initial inquiry is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44. Consequently, "[t]he court will defer to the agency's construction of the statute as a permissible construction if it 'reflects a plausible construction of the plain language of the statute[s] and does not otherwise conflict with Congress' express intent.'" *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996) (citations omitted).

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[3] This case is governed by the provisions of the Tariff Act of 1930, as amended, that were in effect prior to 1 January 1995, the effective date of the Uruguay Round Agreements Act, Pub. L. No. 465, 103d Cong., 2d Sess., 108 Stat. 4809 (1994).

B

ITA MADE A REASONABLE DECISION TO EXCLUDE FROM ITS ANTIDUMPING CALCULATIONS CERTAIN U.S. SALES OF ASTM A–335 PIPE MADE DURING THE PERIOD OF INVESTIGATION ("POI") BECAUSE THE SCOPE DESCRIPTION PROVIDED BY ITA WAS AMBIGUOUS

During verification, Commerce discovered that Dalmine failed to report certain U.S. sales of ASTM A–335 pipe used in boiler applications. Commerce determined that the ambiguous scope description contained in the Notice of Initiation and Preliminary Determination caused Dalmine to believe that this merchandise was not included in the investigation, and thus these sales did not need to be reported. Commerce decided to exclude these sales from the calculation of the dumping margin. Quanex contends that Commerce erred in not including these sales and argues that the scope description clearly encompassed this merchandise. For the reasons that follow, Quanex's argument fails.

1

BACKGROUND

As proposed by Quanex, "[t]he scope of this petition includes all subject seamless pipe produced to the ASTM A–106, ASTM A–335, ASTM A–53 and API 5L specifications, regardless of application". Petition at 5. The scope also included all products not meeting the ASTM A–106, A–335, A–53 or API 5L standards, but used in the covered applications. *Id.* A footnote to the sentence preceding this description stated:

> In addition, A–106 pipe may be used in some boiler applications. However, this petition is not intended to cover boiler tubing unless such tubing is being used as a substitute in applications covered by this petition.

Id. at n. 3.

In defining the scope of the investigation as follows, the ITA slightly modified Quanex's Petition and, in addition to listing ASTM A–106, ASTM A–53, ASTM A–335, and API 5L as covered specifications, stated:

> The following information further defines the scope of these investigations * * * A–106 pipe may be used in some boiler applications. The scope of these investigations includes all multiple-stenciled seamless pipe meeting the physical parameters described above and produced to one of the specifications listed above, whether or not also certified to a non-covered specification. Standard, line and pressure applications are defining characteristics of the scope of these investigations. Therefore, seamless pipes meeting the physical description above, but not produced to the A–106, A–53, or API 5L standards shall be covered if used in an A–106, A–335, A–53 or API 5L application. * * * Specifically excluded from these investigations are boiler tubing, mechanical tubing and oil country tubular goods except when used in a standard, line or pressure pipe application.

Initiation Notice, 59 Fed. Reg. at 37,026. The scope description contained in the Preliminary Determination was identical to the one contained in the Initiation Notice. 60 Fed. Reg. 5358.

In the Final Determination, Commerce determined that the scope of the investigation included the disputed alloy pipe made to ASTM A–335 specification. 60 Fed. Reg. at 31,981–83. Commerce stated:

> The scope of this investigation includes seamless pipes produced to the ASTM A–335, ASTM A–106, ASTM A–53 and API 5L specifications and meeting the physical parameters described below, regardless of application. The scope of this investigation also includes all products used in standard, line, or pressure applications and meeting the physical parameters below, regardless of specification.
>
> * * * * * * *
>
> Specifically excluded from this investigation are boiler tubing and mechanical tubing, **if such products are not produced to A–335, A–106, A–53 or API 5L specifications** and are not used in standard, line or pressure applications.

Id. at 31,981–82 (emphasis added).

Commerce stated that the scope description contained in the Initiation Notice and Preliminary Determination was ambiguous. *Id.* at 31,987. Commerce decided to exclude the sales of pipe made to A–335 specification which were used in boiler applications for purposes of its final calculation so that Dalmine would not be penalized for a reasonable misunderstanding. *Id.* at 31,987.

Commerce explained:

> Based on the results of the Houston verification, it is apparent that there had been considerable confusion concerning scope coverage. In order to eliminate this confusion, we find it necessary to clarify the scope to make explicit that all products made to ASTM A–335, A–106, A–53 and API 5L are covered, regardless of application, and modify any future suspension of liquidation instructions to Customs. **Therefore, considering the ambiguity in the scope language, it is not appropriate to penalize the respondent by including these sales**.

Final Concurrence Mem. of June 12, 1995 at 10, AR Non Pub. Doc. 108, Fiche 104, Fr. 1 (emphasis added). Thus, although Commerce determined that pipe produced to a covered specification but used in a non-covered application is within the scope of the investigation, it excluded these sales from the dumping margin because the scope language was ambiguous. Final Determination, 60 Fed. Reg. at 31,984, 31,987.

2

COMMERCE REASONABLY DETERMINED THAT THE SCOPE DESCRIPTION WAS AMBIGUOUS AND EXCLUDED CERTAIN U.S. SALES

This issue is extremely narrow: whether Commerce may exclude certain U.S. sales from the dumping margin calculation when the respondent's failure to report those sales was due to the ambiguous scope description found in the Initiation Notice and Preliminary Determina-

tion. Based on the specific facts of this case, Commerce's actions were reasonable.

Commerce, in administering the antidumping duty program, interprets antidumping duty orders and determines which products fall within the scope of the order. *Ericsson GE Mobile Communications Inc. v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995). In discharging this duty, Commerce "enjoys substantial freedom". *Id.* at 782. Before an antidumping duty order is issued, however, Commerce must define the scope of the investigation and perform its investigation. In accordance with Commerce's freedom to interpret an antidumping duty order, the Court views Commerce's interpretation of its scope description with deference.

The parties cite numerous places in the record to support their competing contentions that the scope was either ambiguous or clear. For example, Quanex points to appendices I and V of the questionnaire which list ASTM A–335 alloy pipe as a covered specification. Appendix V provides that some covered products, specifically A–106 pipes, "may be used in some boiler applications." Quanex also argues that Commerce's discussion of the published scope description in the Initiation Concurrence Memorandum put Dalmine on notice of the proper scope description. It describes the scope as follows:

> Petitioner would like the Department to initiate these investigations using a scope that includes any merchandise which (1) meets the physical description of the subject seamless pipe as set forth in the petition, (2) is made to one of the specifications listed in the petition (whether or not also certified to a non-covered specification) **or** is used in one of the types of applications listed in the petition, and (3) is not specifically exempted. Petitioner specifically exempts oil country tubular goods, mechanical tubing and boiler tubing **that is not also certified to one of the covered specifications and that is not used in one of the covered applications**.

Initiation Concurrence Mem. of July 13, 1994 at 4, AR Pub. Doc. 18, Fiche 4, Fr. 85 (emphasis added).

Dalmine, on the other hand, argues that it "informed both ITA and Quanex that it considered various types of boiler products bearing subject stencils to be non-subject merchandise." Mem. of Defendant-Int. Dalmine S.p.A. et al. In Oppos. To Plaintiff's Mot. For Judgment On The Agency Record at 30 ("Dalmine Response"). According to Dalmine, footnote 3 to the petition contributed to its confusion. It states:

> In addition, A–106 pipe may be used in some boiler applications. However, this petition is not intended to cover boiler tubing unless such tubing is being used as a substitute in applications covered by this petition.

Petition at n. 3. Dalmine claims that "Quanex's use of the word 'however' in the footnote logically can only mean that all boiler pipe—including ASTM A–106 boiler pipe—was non-subject merchandise, provided it was not used in a subject application." Dalmine Response at 19–20.

Dalmine also claims that in exhibit 5 to its petition, Quanex noted that excluded boiler products "ha[ve] separate [Harmonized Tariff Schedule] subheadings", which suggested that all pipes to be used in a boiler application were excluded. Dalmine Response at 21. According to Dalmine, Quanex's statement that "[t]he fact that [Tubicar's A–106] boiler tubing products may not be in the scope of the investigation does not prevent them from being used as the basis for foreign market value", Quanex Letter of Sept. 26, 1994 to Sec'y Comm. Objecting to Outlier Request at 3, AR Pub. Doc. 65, Fiche 12, Fr. 1, is an admission that boiler application products bearing a subject stencil are non-subject merchandise. Dalmine Response at 31.

Here, Commerce determined that the scope description "was unclear as to whether the products in question are subject merchandise. The respondent did not report these sales based on its reading of the scope of the initiation * * * the scope language in the initiation is ambiguous * * *." Final Determination, 60 Fed. Reg. at 31,987. In view of the conflicting information above, and because the Court looks upon Commerce's interpretation of its scope description with deference, Commerce's determination that the scope description was ambiguous is reasonable. Commerce clarified the scope description in the Final Determination, thus assuring that the subject merchandise will be included in all subsequent reviews.[4]

3

ALTHOUGH THE NARROW FACTS OF THIS CASE SUPPORT EXCLUSION OF U.S. SALES BASED ON AMBIGUITY IN THE SCOPE DESCRIPTION, MOST RESPONDENTS WILL NOT BE ABLE TO MEET THIS STANDARD

Neither Commerce nor this Court is opening the door for respondents "to control the amount of antidumping duties" by deliberately miscommunicating in order to claim ambiguity in the scope description. *See Persico Pizzamiglio, S.A. v. United States*, 18 CIT 299, 304 (1994) (citing *Olympic Adhesives, Inc. v. United States*, 8 Fed. Cir. (T) 69, 76, 899 F.2d 1565, 1572 (1990)). A respondent is still responsible for seeking clarification from Commerce in order to create an adequate record. *Chinsung Indus. Co., Ltd. v. United States*, 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989). In this case, however, the Court agrees with Commerce that all of the parties believed in good faith that they were interpreting the scope

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[4] As a result of the Court's determination that Commerce's exclusion of the ASTM A–335 pipe used in boiler applications from the antidumping calculations is reasonable, Quanex's claims that Commerce erred (1) in not applying BIA to these sales to calculate a margin and (2) that the BIA used should have been adverse, are moot.

A final determination of dumping may only be based on verified information or the best information otherwise available ("BIA"). 19 U.S.C. § 1677e (1988). BIA is used whenever: (1) ITA is unable to verify the accuracy of information provided in a response, 19 U.S.C. § 1677e(b); (2) a party or any other person "refuses or is unable to produce information requested in a timely manner and in the form required," 19 U.S.C. § 1677e(c), or (3) a party or any other person "significantly impedes an investigation." *Id.*

Here, none of the statutory triggers providing for the application of BIA have been met. Dalmine was not put on notice that the ASTM A–335 pipe used in boiler applications was included in the investigation. In other words, the ITA never "requested" this information from Dalmine. The ITA, in its discretion, determined that the ambiguous scope description excused Dalmine's failure to report this pipe and did not find that Dalmine had "significantly impeded the investigation" on this issue. Because Commerce's determination not to apply BIA is affirmed by this Court, it follows that Commerce's determination not to apply adverse BIA is also affirmed.

correctly. As a result, because of its unique facts, this case does not adversely impact those considerations.

C

COMMERCE EXPLAINED ITS DECISION TO EXCLUDE THE UNREPORTED U.S. SALES FROM THE MARGIN CALCULATION

The Court rejects Quanex's argument that Commerce failed to explain why it did not calculate a margin for the ASTM A–335 pipe used in boiler applications or include it in its average margin and duty deposit calculations. Quanex admits that Commerce provided an explanation for why it was not applying an adverse BIA, but erroneously concludes that Commerce's failure to explain its reasons for not applying some other BIA renders the determination unsupported by substantial evidence on the record and contrary to law. Brief Of Plaintiff Gulf States Tube Div. Of Quanex Corp. In Support Of Its Motion For Judgment Upon The Agency Record at 43 (Quanex Brief).

With regard to the ASTM A–335 pipe used in boiler applications, Commerce stated:

> we agree that the merchandise is within the scope of the investigation. However, we have decided that the use of adverse BIA for these unreported sales is unwarranted. * * * [T]he scope language, as published in the notice of initiation and the preliminary determination, was unclear as to whether the products in question are subject merchandise. The respondent did not report these sales based on its reading of the scope of the initiation. Since the scope language in the initiation is ambiguous (and hence has been clarified in the final determination), it is not appropriate to penalize the respondent.

Final Determination, 60 Fed. Reg. at 31,987.

Commerce did not apply any BIA to these sales, adverse or otherwise. As a result, the explanation set out above is the ITA's explanation for its treatment of these unreported sales, *i.e.*, their exclusion from the antidumping calculations. The ITA's explanation clearly states that the ambiguous scope description excused Dalmine's failure to report these sales. Application of any BIA may penalize Dalmine because it is the "Best Information Available" and not necessarily the most accurate information available. This would be contrary to the purpose of the antidumping laws which "are remedial not punitive." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). Commerce has sufficiently explained its actions.

D

THE ITA'S DECISION TO APPLY ADVERSE BIA TO DALMINE'S SALE OF HONING STOCK IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IS IN ACCORDANCE WITH LAW

Dalmine received permission from Commerce to not report its U.S. sales of meter run pipe and other products because they comprised less than 5% of Dalmine's total U.S. POI subject sales even though these products were covered by the scope of the investigation. Final Deter-

mination, 60 Fed. Reg. at 31,987; Mem. of Nov. 28, 1994 from Team to Stafford at 3. At verification, Commerce found an additional sale of a product called "honing stock" which it determined should have been included in the exclusion request. Because this additional sale raised the percentage of excluded products over 5% of Dalmine's total U.S. POI subject sales, Commerce decided to apply adverse BIA to the sale of honing stock and to the sales included in the exclusion request.

Dalmine argues that the honing stock was not covered by the scope of the investigation because it was a non-subject intermediate pipe that was produced to non-standard pipe sizes. Dalmine also argues that the application of adverse BIA to the sale of honing stock and to the excluded sales was "draconian". For the reasons that follow, the Court upholds Commerce's determination that the honing stock is reportable and that the application of adverse BIA to these sales is supported by substantial evidence on the record and in accordance with law.[5]

1

BACKGROUND

On September 19, 1994, Dalmine requested the exclusion of certain U.S. sales from its antidumping calculations, alleging that they constituted only an insignificant quantity of all U.S. sales. AR Non Pub. Doc. 7, Fiche 58, Fr. 41. Among other products, Dalmine requested the exclusion of meter run pipe.

In agreeing to exclude the U.S. sales from its margin analysis, Commerce warned:

> We generally consider that outlier sales of less than 5% based on volume may be excluded from analysis. *(See, Stainless Steel Bar From Italy (A–475–813))*. We believe that in this case, the percentage of outlier sales is insignificant based on volume and do not consider such quantities critical to our analysis. **However, if the information is not available for verification in Italy, we will confirm the accuracy of the percentages and circumstances surrounding these sales at Dalmine's U.S. facilities**.

Mem. of Nov. 28, 1994 from Team to Stafford at 3, AR Non Pub. Doc. 22, Fiche 69, Fr. 90.

At verification, Commerce discovered that Dalmine failed to include an amount of meter run tubing in its request. Commerce considered both pipe and tube to be within the scope of the investigation because "the physical parameters of the scope include all seamless carbon and alloy steel pipes, of circular cross-section, not more than 4.5 inches in outside diameter, regardless of wall thickness. Therefore, the fact that such products may be referred to as tubes by some parties, and may be multiple-stenciled, does not render them outside the scope." Final Determination, 60 Fed. Reg. at 31,984.

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[5] The Court, because it has affirmed Commerce's application of adverse BIA, does not need to reach Quanex's argument that Commerce's five percent exclusion policy "is beyond Commerce's statutory authority and would be contrary to law if applied in this case." Mem. Of Gulf States Tube Div. In Oppos. To Dalmine's Mot. For Judgment On Counts I-VII at 38 ("Quanex Response").

As a result, Commerce applied an adverse BIA to the unreported pipe as well as the pipe included in the request. Commerce explained:

> In the early stages of this investigation, the respondent made several requests to be excused from reporting particular categories of U.S. sales which were clearly covered by the scope of this investigation. The respondent based this exclusion request on the claim that these sales represented a certain percentage of total U.S. sales. Based on this representation, we granted the request but indicated that the claim would be subject to verification. At verification, we found additional unreported sales of the same merchandise that was the subject of the respondent's exclusion request. These additional unreported sales constitute a significant additional quantity than was represented in the exclusion request. Accordingly, we have assigned a margin based on BIA to the U.S. sales involved in the exclusion request, as well as the additional unreported sales of the same merchandise.

Id. at 31,987.

2

HONING STOCK IS A REPORTABLE PRODUCT REGARDLESS OF WHETHER IT WAS A NON-SUBJECT INTERMEDIATE PRODUCT AND WAS PRODUCED TO NON-STANDARD PIPE SIZES

Dalmine claims that the meter run pipe at issue, known as honing stock,[6] was not reportable because it was both a non-subject intermediate product and was produced to non-standard pipe sizes. Dalmine Case Brief at 9, 16, 29, 30, AR Non Pub. Doc. 93, Fiche 93–95, Fr. 1. However, because the A–106 stencil appeared on the honing stock and it was not used in an excluded application, it is reportable. In addition, the Court rejects Dalmine's argument that the honing stock, as a "tube", is not covered by the scope of the investigation.

A

THE HONING STOCK BORE AN A–106 STENCIL AND WAS NOT USED IN AN EXCLUDED APPLICATION

The ITA excluded from the investigation "redraw hollows", stating:

> With respect to redraw hollows for cold drawing, the scope language excludes such products specifically when used in the production of cold-drawn pipe or tube. We understand that petitioner included this exclusion language expressly and intentionally to ensure that hollows imported into the United States are sold as intermediate products, not as merchandise to be used in a covered application.

Final Determination, 60 Fed. Reg. at 31,984.

Dalmine argues that honing stock is an intermediate product that is finished through a cold process (that is, honing), just like hollows. In

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[6] Honing stock is a type of meter run pipe that is used in flow measurement applications in which the customer's inside diameter requirements are more precise than can be achieved by the more conventional cold-drawing process. Brief Of Dalmine S.p.A., Dalmine USA Inc., And TAD USA, Inc. In Support Of Their Motion For Judgement Upon The Agency Record at 30–31 (Dalmine Brief).

addition, Dalmine states that honing stock is not used to convey liquids or gas (or in any other application) and therefore is not used "in a covered application", in the form in which it is sold by Dalmine. Dalmine argues that it reasonably concluded that it was not subject merchandise because honing stock must undergo significant further processing before it can be used. *See* Sales Verif. Ex. M–6, AR Non Pub. Doc. 87, Fiche 89, Fr. 51 (showing that the merchandise was processed by a customer of Dalmine's).

Commerce made no determination that honing is equivalent to cold-drawing, and the scope description does not indicate that honing is excluded from the investigation as equivalent to cold-drawing. *See* Initiation Notice, 59 Fed. Reg. at 37,026. Further processing of the honing stock by the purchaser does not meet the "redraw hollows" exclusion from the scope of the investigation. *See id.* (Commerce's guidance on this exclusion is: "[e]xcluded from these investigations are redraw hollows for cold-drawing when used in the production of cold-drawn pipe or tube.").

The record shows that the A–106 stencil appeared on honing stock in question. *See* Sales Verification Exhibit M–6, AR Non Pub. Doc. 87, Fiche 89, Fr. 51. That is one of the four listed specifications contained in the scope description. Accordingly, the honing stock was within the scope of the investigation. *See* Initiation Notice, 59 Fed. Reg. at 37,025–26. Coupled with the evidence that it was not used in an excluded application, honing stock was a reportable product. As a result, Commerce's determination that the honing stock is covered by the scope of the investigation is reasonable and in accordance with law.

B

EVEN IF THE HONING STOCK IS CONSIDERED A "TUBE", IT IS STILL COVERED BY THE SCOPE OF THE INVESTIGATION

Dalmine also argues that the honing stock was not subject merchandise because it is a "tube" produced to non-pipe sizes, and is not a "pipe". Dalmine states that pipes are hollow steel products produced to a finite number of OD and wall thickness combinations such as ASTM A–106, A–53, A–335, and API–5L. Tubes, it claims, are produced to any other OD or wall thickness combinations. Dalmine Brief at 34–36. Dalmine points to Commerce's statement that redraw hollows could be used to produce either "pipe or tube" as a further example that Commerce recognized a difference. *See* Initiation Notice, 59 Fed. Reg. at 37,026.

The ITA determined that all hollow steel products, both pipes and tubes, having an OD of not more than 4.5 inches, were products subject to the Seamless Pipe investigation. Final Determination, 60 Fed. Reg. at 31,984. The ITA pointed out that the product definition included in the investigation all pipe having an OD of less than 4.5 inches, "regardless of wall thickness." *Id.* Commerce stated:

> Although it is unclear as to where the dividing line between pipe and tube products is at the present time, it is our understanding that petitioner intended to include pipes of all wall thicknesses in

> the scope of the subject proceedings. The very first sentence of the scope which refers to the physical description of the merchandise reads as follows: "For purposes of [these investigations], seamless pipes are seamless carbon and alloy (other than stainless) steel pipes, of circular cross-section, not more than 114.35 mm (4.5 inches) in outside diameter, *regardless of wall thickness* (emphasis added) * * *" Although not specifically stated in the petition, it would appear by this language that tubes are included in the scope of the investigation if they are produced to one of the covered specifications or otherwise used in standard, line or pressure pipe applications.

Mem. Re. Additional Scope Clarification Questions at 7, AR Pub. Doc. 258, Fiche 52, Fr. 60. Thus, Commerce's determination that there is no distinction between pipes and tubes in this case is reasonable.[7]

3

THE APPLICATION OF ADVERSE BIA DUE TO THE UNREPORTED HONING STOCK SALE IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IN ACCORDANCE WITH LAW

When Commerce discovered the honing stock that should have been included in the exclusion request, it applied adverse BIA to that sale as well as to those sales included in the exclusion request. Dalmine argues that this action is "draconian" and exaggerates the significance of the honing stock sale. The Court affirms Commerce's application of adverse BIA to these sales.

Congress has provided for Commerce to use the "Best Information Available" whenever it is unable to verify the accuracy of information provided in a response, information requested is not supplied in a timely manner or the required form due to either refusal or inability, or the investigation is significantly impeded. 19 U.S.C. § 1677e(b) and (c). According to the tiered system for using BIA, BIA can be partial or total, and can be adverse or non-adverse, depending on the circumstances. *Nat'l Steel Corp. v. United States*, 18 CIT 1126, 1131, 870 F. Supp. 1130, 1135 (1994). Commerce will apply non-adverse partial BIA where there is an inadvertent gap in the record or a minor or insignificant adjustment is involved. *Id.* at 1132, 870 F. Supp. at 1136.

The Court of Appeals for the Federal Circuit has determined the conditions under which BIA may be considered adverse or "punitive". It stated:

> In order for the agency's application of the best information rule to be properly characterized as "punitive," the agency would have had to reject low margin information in favor of high margin information that was demonstrably less probative of current conditions.

Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990).

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[7] The Court rejects Dalmine's argument that "[t]his phrase [regardless of wall thickness] does *not* mean that the product scope includes all hollow steel products of *every* wall thickness." Dalmine Brief at 37–38 (emphasis in original). It appears from the record that is exactly what Commerce meant, if they contain the subject stencils.

Dalmine argues that it made a *single* sale of only [ ] tons of honing stock in the U.S. market during the POI, equal to [a certain percentage] of their total POI U.S. sales of subject merchandise. Dalmine concludes that "[t]his trivial amount cannot be "significant" under any circumstances." Dalmine Brief at 38. Dalmine adds that even if it had included the honing stock sale in its exclusion request, the total of the request would still be less than 5% of U.S. subject total sales and thus is harmless error. Dalmine Brief at 39.

Commerce granted Dalmine's exclusion request based on the representations made by Dalmine. Contrary to Dalmine's assertion, inclusion of the honing stock in the exclusion request would have caused it to be over 5% of the total U.S. sales. The honing stock sale of [ ] tons added to the [ ] tons Dalmine requested the exclusion for, amounts to over 5% of the total U.S. sales of [ ] tons that should have been reported by Dalmine for the POI ([ ] actually reported by Dalmine plus [ ] which should have been reported). Defendants' Mem. In Partial Opposition To Counts 1–7 Of The Mot. For Judgment On The Agency Record Filed By Dalmine at 26–27 ("Defendants' Mem."). Thus, the exclusion request fell outside Commerce's stated guidelines.

Accordingly, the addition of the single sale of honing stock is significant because it raised Dalmine's unreported sales above the 5% threshold. *See* Final Determination 60 Fed. Reg. at 31,987. The missing information, *i.e.*, the honing stock sale, was in the control of Dalmine. This information did not amount to an inadvertent gap in the record and cannot be considered a minor or insignificant adjustment which would justify the application of neutral BIA. Thus, application of adverse BIA is appropriate and hardly "draconian".[8]

E

THE ITA'S DECISION TO INITIATE A BELOW-COST-OF-PRODUCTION ("COP") INVESTIGATION OF DALMINE'S HOME MARKET SALES IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IN ACCORDANCE WITH LAW

Commerce initiated a COP investigation of Dalmine's home market sales based on information given to it by Quanex. Subsequently, Commerce did find below cost-of-production sales and as a result employed the constructed value of the merchandise to determine the foreign market value. Dalmine claims that ITA's initiation of the COP investigation was unlawful because (1) it lacked reasonable grounds to believe or suspect that Dalmine's home market prices were below its cost of production and (2) Quanex failed to provide an appropriate public version of its allegations, contrary to Commerce's regulations. For the reasons that follow, Dalmine's arguments fail.

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[8] Draconian: barbarously severe; harsh; cruel. *Webster's New International Dictionary*, Unabridged, 780 (2d ed. 1954). The ITA's actions in this instance do not rise close to the level of "draconian". Indeed, the ITA's treatment of these sales is consistent with its treatment of the ASTM A–335 pipes used in boiler applications discussed previously and from which Dalmine benefited when the ITA decided to exclude those sales from the margin calculation. Dalmine is asking the Court to require ITA to treat these products differently, which the Court declines to do.

1

BACKGROUND

In a letter dated November 22, 1994, Quanex alleged that Dalmine was selling seamless pipe in Italy at below cost. AR Non Pub. Doc. 21, Fiche 69, Fr. 1. Quanex claimed that it "does not know, and has no way of obtaining Dalmine's actual cost of production for the subject merchandise" because Dalmine had not (1) reported its sales in the U.S. that did not have identical matches in Italy or any differences in the physical characteristics of the merchandise being compared, and (2) placed on the record detailed financial statements. *Id.* at 1–2. As a result, Quanex stated that it had to construct Dalmine's COP using the COP of a U.S. domestic producer that had similar production processes and cost structure to Dalmine. *Id.* at 2.

Dalmine objected to the information presented by Quanex. Dalmine's Letter of Dec. 2, 1994, AR Pub. Doc. 97, Fiche 17, Fr. 23. Dalmine claimed that the cost analysis was flawed because (1) the surrogate's cost should have been based on the fiscal year of 1994 instead of 1993; and (2) the International Trade Commission ("ITC") had found that the productivity of the U.S. domestic industry has been increasing since 1992, contrary to Quanex's representation that it had decreased. *Id.*

Quanex responded to Dalmine's first comment by explaining that the 1994 and 1993 usage rates had been certified as identical by the party supplying the information. Quanex's Letter of Dec. 9, 1994 at 1–2, AR Non Pub. Doc. 25, Fiche 70, Fr. 25. With regard to the second comment, Quanex stated that the "aggregated data reported by the ITC simply has no relationship to the producer-specific and product-specific data used by petitioner." *Id.* at 2.

Initially, Commerce decided not to initiate the COP investigation because it could not rely upon the cost data submitted by Quanex to show whether there were reasonable grounds to believe or suspect that below-cost sales were made. Mem. of Dec. 23, 1994 from Team to Stafford, AR Non Pub. Doc. 33, Fiche 79, Fr. 28. Quanex objected to the decision not to initiate a COP investigation. Quanex's Letter of Jan. 3, 1995, AR Non Pub. Doc. 34, Fiche 79, Fr. 32.

Commerce's Office of Accounting and Investigations consulted with Richard Weible, the Division Director of the Office of Agreements Compliance, and the in-house expert on matters relating to the steel industry. Mr. Weible analyzed Quanex's below-cost allegations and concluded that the methodology used by Quanex was reasonable. Mem. of Feb. 1, 1995 from Mr. Weible, AR Non Pub. Doc. 54, Fiche 81, Fr. 41.

Taking into account the information submitted by Quanex and Dalmine, Mr. Weible made several determinations. He agreed with Dalmine that seamless pipe mills produce products in specific size ranges, that producing pipe in smaller sizes will cost more, and that companies invariably have different production facilities which produce unique products with individual size range capabilities. *Id.* Mr. Weible recognized, however, that the size ranges may overlap from mill to mill. He stated

that petitioners would be unable to make COP allegations if they were required to provide cost data for a comparable mill with the same product size range capacity. *Id.*

Mr. Weible concluded that Quanex provided reasonably available evidence for determining whether Dalmine's sales were below-cost in a certain size. He based this conclusion on the fact that Quanex used the costs of 2 inch material from a surrogate that used the same process as Dalmine to produce the product in its allegations. In addition, the size range capabilities of the surrogate and Dalmine overlapped in this size. *Id.* Finally, the method used by Quanex when it calculated cost differentials, taking into account possible cost differences in producing pipe by different processes (rotary piercing versus the extrusion process), and then deriving costs in smaller sizes by using these differentials was reasonable if not somewhat conservative. *Id.*

In reconsidering its decision not to initiate a COP investigation, Commerce relied upon the following factors: (1) the similar production processes used by the surrogate and Dalmine despite the different size ranges; (2) the application of Quanex's cost ratios to costs developed from the surrogate's data, which provided a conservative result even though the ratios did not exactly reflect Dalmine's cost relationship; and (3) the rejection of Quanex's allegation because it was unable to obtain data from a mill with exactly the same product size range and production facilities would be unreasonable and inconsistent with Commerce's standard for initiation of COP investigations. Mem. of Feb. 1, 1995 from Team to Stafford at 6, AR Non Pub. Doc. 53, Fiche 81, Fr. 33. Subsequently, Commerce found below COP sales for certain products. 60 Fed. Reg. at 31,986.

2

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT COMMERCE HAD REASONABLE GROUNDS TO BELIEVE OR SUSPECT BELOW COST-OF-PRODUCTION SALES

An antidumping duty is calculated "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673. Usually, foreign market value is based upon the price at which the merchandise is sold in the market of the exporting country for home consumption or to third countries other than the United States. 19 U.S.C. § 1677b(a)(1). However, the statute provides:

> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. * * *

19 U.S.C. § 1677b(b). If below costs sales were made in substantial quantities and over an extended period of time, they must be disregarded. *Id.* Commerce must then employ the constructed value ("CV") of the mer-

chandise if the remaining above-cost sales are inadequate for determining foreign market value. *Id.*

"Commerce must have a 'specific and objective' basis for suspecting or believing that sales are being made at prices below the COP before initiating a COP investigation." *FMC Corp. v. United States*, 3 F.3d 424, 428 (Fed. Cir. 1993) (citing *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 250, 575 F. Supp. 1277, 1282 (1983), *aff'd on other grounds*, 745 F.2d 632 (Fed. Cir. 1984)). However, as the Federal Circuit stated in *FMC*:

> [Petitioner] is not required under the statute to prove actual sales below the COP. That is a job for Commerce. To require otherwise would go against the grain of common sense because if [Petitioner] can prove actual sales at below [Respondent's] COP, then a COP investigation would not be necessary.

3 F.3d at 428 n.7. In addition, this Court has stated:

> There is no correlation between what constitutes reasonable grounds to the ITA, and what constitutes information reasonably available to the petitioner. Indeed, the information which is reasonably available to a particular petitioner can be substantially more or less consequential than what Commerce would consider reasonable grounds, depending on how resourceful the petitioner may be. **Hence, the relative rigor of the standard will vary from case to case**.

Torrington Co. v. United States, 15 CIT 456, 460–61, 772 F. Supp. 1284, 1288 (1991) (emphasis added). Here, as recapped in the "Background" of this section, the record shows Commerce had reasonable grounds to suspect that Dalmine was selling below cost. These reasonable grounds are sufficient to explain why Commerce reversed its decision not to perform a COP investigation.[9]

The Court also rejects Dalmine's assertions that Quanex's cost allegations were based on impermissibly non-contemporaneous information, and that the Surrogate's claim its 1993 and 1994 actual "usage rates" were identical is inherently implausible. Dalmine Brief at 47–50. The record reflects that Quanex did use contemporaneous information, *i.e.*, from 1994, which was identical to the 1993 information, because it provided an Affidavit from an official of the surrogate which states that "the usage rates for the surrogate did not change between 1993 and 1994." Quanex Letter of Jan. 3, 1995. Dalmine's claim that identical rates are "inherently implausible" is speculative and unsupported by any competent evidence in the record.

Dalmine also argues that the ITA unlawfully ignored its own practice requiring below cost allegations to be based on costs incurred by U.S. producers adjusted to reflect production costs in the country under in-

[9] The Court need not reach Quanex's argument that this issue is moot because actual below-cost sales were found. Quanex Response at 55. Further, at oral argument held on February 26, 1997, counsel for Quanex admitted that if this issue were remanded it would not be entitled to submit information obtained during the below-cost sales investigation. Quanex misread *Koyo Seiko Co. v. United States*, 16 CIT 740, 796 F. Supp. 517 (1992), which permitted the petitioner only to "supplement its allegation of below-cost-of-production sales with information **not derived from [ITA's] investigation of below-cost-of-production sales**." *Id.* at 745, 796 F. Supp. at 531 (emphasis added).

vestigation. Specifically, Dalmine claims that (a) Commerce made no effort to determine whether the Surrogate uses the same type of "continuous mill" that Dalmine uses, and (b) the Surrogate's per unit usage rates are biased against Dalmine because, it says, the Surrogate probably uses heavier, more expensive equipment to product its seamless pipe, given that its size range is likely larger than Dalmine's range of small diameter pipe.

Dalmine did not cite any statutory authority for its claim that Commerce's regulations require COP allegations to be "adjusted for known differences" in manufacturing processes. Nor did Dalmine demonstrate that it is Commerce's practice to require such adjustments. Nevertheless, the record contains substantial evidence that Commerce did consider these issues raised by Dalmine. *See* Mem. of Feb. 1, 1995 from Team to Stafford. The record states:

> we note that the surrogate and respondent use similar production processes, even though the size range of seamless pipe produced may not be the same. When petitioner's cost ratios are applied to cost developed from the surrogate's data, even if these ratios do not exactly reflect respondent's cost relationships, the result is conservative and, therefore, in respondent's favor. This is because petitioner's methodology yielded a lower cost per ton for the smaller diameter pipe, which generally is more expensive on a tonnage basis, than larger diameter pipe.

Id. at 6. Thus, since Commerce's decision is supported by substantial evidence on the record and is in accordance with law, Dalmine's argument is rejected.

Finally, the Court rejects Dalmine's argument that the "exclusionary rule" from the Fourth Amendment is applicable to the initiation of a below-cost investigation. The exclusionary rule is applied in criminal cases or "quasi-criminal" cases to deter unreasonable searches and seizures. *United States v. Modes, Inc.*, 16 CIT 189, 192–94, 787 F. Supp. 1466, 1470–71 (1992). A quasi criminal case is one in which "the objective of those proceedings is to impose what appears to be a penalty." *Id.* at 193, 787 F. Supp. at 1471. Thus, in civil proceedings, the exclusionary rule is applicable only "where the 'object, like a criminal proceeding, is to penalize for the commission of an offense against the law.'" *Id.* at 191, 787 F. Supp. at 1469 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 85 S.Ct. 1246, 1250 (1965)).

This proceeding is not criminal or quasi-criminal in nature. The objective of the antidumping statute is not to penalize a respondent. *See NTN Bearing Corp. v. United States*, 74 F.3d. 1204, 1208 (Fed. Cir. 1995) (recognizing that the antidumping laws are remedial rather than punitive). Rather, the purpose of the proceeding is to assess duties that will in principle eliminate the unfair trade practice. *See Chaparral Steel Co. v. United States*, 8 Fed. Cir. (T) 101, 109, 901 F.2d 1097, 1103 (1990) (purpose of duties is remedial because they are "intended merely to prevent future harm to the domestic industry by reason of unfair imports that

are *presently* causing material injuries." (emphasis in original)). Consequently, the exclusionary rule is inapplicable in this case.

2

THE INITIAL FAILURE OF QUANEX TO PROVIDE AN APPROPRIATE PUBLIC VERSION OF THE BUSINESS PROPRIETARY ALLEGATIONS TO THE BELOW-COST-OF-PRODUCT PETITION DID NOT RENDER ITA'S INITIATION OF THE BELOW COP INVESTIGATION IMPROPER

The statute requires that when a document containing proprietary information is submitted to ITA, it:

> *shall* require that information for which proprietary treatment is requested be accompanied by—
> (A) either—
> (i) a non-proprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or
> (ii) a statement that the information is not susceptible to summary accompanied by a statement of the reasons in support of the contention * * *.

19 U.S.C. § 1677f(b)(1) (emphasis added). The ITA's regulations on antidumping duties state:

> *Public Summary* * * * [N]ot later than one business day after submitting information for which proprietary treatment is requested, any person who requests proprietary treatment *shall* provide to the Secretary:
> (1) An adequate public summary of all proprietary information, incorporated in the public version of the document (generally, *numeric data are adequately summarized if grouped or presented in terms of indices, or figures within 10 percent of the actual figure, and if an individual portion of the data is voluminous, at least one percent representative of that portion is individually summarized in this manner);* or
> (2) A statement itemizing those portions of the proprietary information which cannot be summarized adequately and all arguments supporting that conclusion for each portion.

19 C.F.R. § 353.32(b) (1994) (emphasis added).

There is no allegation or evidence in the record indicating Quanex's submission of below-cost allegations containing proprietary information was untimely. The issue concerns only the submission of the public version. The record reflects that Quanex did submit the necessary public summary. On January 17, 1995, Commerce orally requested Quanex to submit a revised nonconfidential version of its November 22, 1994 allegation of sales below cost. *See* Quanex's Letter of Jan. 17, 1995, AR Pub. Doc. 132, Fiche 26, Fr. 27. Quanex complied, and Commerce properly considered the information.

The Court rejects Dalmine's argument that it was unable to gain a "reasonable understanding of the substance" necessary to adequately participate in defending their interests against Quanex's below-cost al-

legations because a proper non-confidential summary was unavailable. Dalmine Brief at 65. Dalmine's counsel had access to the proprietary document under an administrative protective order. *See* 19 U.S.C. § 1677f(c). Although Dalmine claims that "[c]ounsel's access to the business proprietary data under an APO is *no* substitute for the client's access to the public version of those data", Dalmine's Reply to Mem. In Opp. To Dalmine Brief at 15 ("Dalmine Reply"), the Court notes that Dalmine's counsel was able to obtain sufficient cooperation from its client to craft its legal arguments in considerable depth.

Dalmine's claim that the public version was insufficient under 19 C.F.R. § 353.32(b) is rejected. Commerce's regulations provide that "generally, numeric data are adequately summarized if grouped or presented in terms of indices, or figures within 10 percent of the actual figure. * * *" 19 C.F.R. § 353.32(b)(1). The public version contained (1) indexed costs for each subcategory of cost in Exhibit 1 and (2) provided indexed costs for each stage of production and indexed usage rate and ranged cost subtotals for each stage of production in the cost build-up in Exhibit 2. Quanex's Letter of Jan. 17, 1995. Quanex did not include a public summary of the results of the below-cost analysis because it contained Dalmine's proprietary data which Quanex was not allowed to summarize. *Id.* Thus, there is substantial evidence on the record to support Commerce's initiation of the COP investigation.

F

THE COURT REMANDS TO ITA TO RECALCULATE THE COP AND CV WITH RESPECT TO DTI'S GALVANIZED PRODUCTS

Commerce overstated Dalmine's actual COP for galvanized pipe produced by Dalmine Tubi Industriali S.r.l. (hereinafter "DTI"), a production subsidiary of Defendant-Intervenor Dalmine S.p.A., by improperly allocating factory overhead costs. Consequently, the Court remands for recalculation of the COP and CV with respect to DTI's galvanized products.

DTI produces Seamless Pipe at a facility known as the "FAP mill." Cost Verif. Rep. at 2, AR Non Pub. Doc. 91, Fiche 92, Fr. 1. For certain galvanized pipes that Dalmine sold in the U.S. market, DTI produced the bare (ungalvanized) pipe at the FAP mill, and then used an unrelated third party to transport the bare pipe to a second unrelated third party for galvanizing. Response of Dalmine to the Dept's Section D Quest. at 44–45 (Dec. 19, 1994), AR Non Pub. Doc. 29, Fiche 71–78. As a result, the galvanizing and transportation costs are incurred outside Dalmine's production facility.

In the Final Determination, ITA made certain adjustments to Dalmine's previously reported factory overhead costs. 60 Fed. Reg. at 31,986. Commerce agrees, and the record reflects, that these adjustments resulted in the overstatement of the factory overhead costs attributable to galvanized pipe. An error occurred when Commerce applied revised cost variance and overhead rates. At that time, Commerce calculated the overall variance rate as the total variance to total

standard cost. When the variance rate was applied to the cost of manufacturing which included galvanizing costs, the COP and CV were overstated. Defendants' Mem. at 45–46. Although a request by Commerce for remand does not control the Court, *see Hylsa, S.A. De C.V. v. United States*, 960 F. Supp. 320, 322 (CIT 1997), in this case there is substantial evidence on the record that an error in calculation occurred. Consequently, this issue is remanded to Commerce.

G

THE ITA'S DECISION TO ATTRIBUTE A PORTION OF IRI'S INTEREST EXPENSES TO DALMINE'S COP AND CV IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IS IN ACCORDANCE WITH LAW

Commerce attributed a portion of the consolidated interest expense reported by Dalmine's parent company, IRI S.p.A.,[10] to Dalmine's COP and CV. Dalmine claims that this action distorted its actual interest expenses. For the reasons that follow, the Court rejects Dalmine's argument.

1

BACKGROUND

Commerce used the interest expense of IRI for calculating Dalmine's CV and COP instead of Dalmine's own financing costs. Because IRI's 1994 audited consolidated financial statements were not available, Commerce used IRI's 1993 statements. Mem. from Theresa L. Caherty, Accountant to Christian Marsh, Director, Office of Accounting, Verification of COP and CV at 26 (May 10, 1995), AR Non Pub. Doc. 91, Fiche 92, Fr. 1. In the Final Determination, Commerce explained its actions:

> The Department's long-standing practice is to calculate interest expense for COP/CV purposes from the borrowing costs incurred by the consolidated group. Silicon Metal from Brazil, 56 Fed. Reg. at 26,986 (1991). This methodology, which has been upheld by the CIT in Camargo Correo Metals, S.A. v. U.S., Slip Op. 93–163 (CIT 1993), is based on the fact that the consolidated group's controlling entity has the power to determine the capital structure of each member of the group. IRI has such power since it owns a substantial majority of Dalmine through ILVA. In addition, although the respondent claims that IRI does not exercise control over Dalmine's operations, it is the Department's position that majority equity ownership is prima facie evidence of corporate control. See, e.g., Final Determination of Sales at Less Than Fair Value: New Minivans from Japan (Minivans), 57 FR 21946 (May 26, 1992). The respondent has not presented sufficient evidence to demonstrate that IRI's consolidated financing expense would distort Dalmine's financing costs. In Minivans, we determined that, as a member of a consolidated

[10] The relationship between the companies is:

> Dalmine is DTI's first line parent. 84.08% of the outstanding stock of Dalmine is owned by ILVA S.p.A. in liq. ("ILVA"). The majority of Dalmine's financing is provided by Ilva Finance Limited ("ILIIC") another subsidiary of ILVA. ILVA is in turn owned 100% by Instituto per La Riconstruzione Industriale S.p.A. ("IRI").

Mem. of May 10, 1995 at 26.

> group of companies, the operations of a financing company remain under the controlling influence of the group. Like other members of the consolidated group, the financing company's capital structure is determined largely within the group. Consequently, its interest income and expense are as much as part of the group's overall borrowing experience as any other member company.
>
> Lastly, we do not consider it more appropriate to use Dalmine's 1994 consolidated figures over IRI's 1993 consolidated figures simply because Dalmine's audited information more closely relates to the time period of the POI. We have no reason to believe that IRI's 1993 audited financial statement interest expense data is not representative of the POI.

Final Determination, 60 Fed. Reg. at 31,990.

2

COMMERCE'S CALCULATION OF DALMINE'S INTEREST EXPENSE FOR COP AND CV PURPOSES FROM THE BORROWING COSTS INCURRED BY THE CONSOLIDATED GROUP IS REASONABLE

When calculating CV, Commerce adds "an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration * * *", 19 U.S.C. § 1677b(e)(1)(B), to the cost of materials and of fabrication or other processing. According to Commerce's regulations, COP is based on the cost of materials, fabrication and general expenses incurred in the production of such or similar merchandise. 19 C.F.R. § 353.51(c).

Congress has not clarified what "general expenses" are or how they are calculated. *See* 19 U.S.C. § 1677b(e)(1)(B). Pursuant to the discretion granted to it by Congress, then, Commerce devised a methodology for calculating general expenses. Commerce includes in general expenses both (1) selling, general and administrative expenses, and (2) financial expenses. *See, e.g.*, Verification of COP and CV Mem. of May 10, 1995 from Caherty to Marsh, Director, Office of Accounting, at 24–27, AR Non Pub. Doc. 91, Fiche 92, Fr. 1 (setting forth the basic steps Commerce performed during verification of Dalmine's general expenses).

IRI is Dalmine's ultimate parent. As a result, Commerce attributed a portion of the consolidated interest expense reported by IRI on its consolidated financial statements to Dalmine's reported COP and CV, and thus calculated Dalmine's interest expense from the borrowing costs incurred by the consolidated group as a whole. Final Determination, 60 Fed. Reg. at 31,990.

Dalmine does not disagree that Commerce may use the consolidated interest expense from a parent company when the subsidiary is being investigated. Rather, Dalmine claims that in this case, Commerce should have used Dalmine's own financing costs instead of those of IRI. Although Dalmine was able to cite to other cases in which the ITA treated consolidated interest expenses differently from this case, those decisions were presumably supported by substantial evidence on the ad-

ministrative record which justified a change in Commerce's practice. As discussed in more detail below, Dalmine was not able to provide support for its contentions through cites to the record. Thus, the Court finds Commerce's practice to be reasonable.

A

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT IRI DOES NOT EXERCISE CONTROL OVER DALMINE'S OPERATIONS

Commerce's practice is to consider majority equity ownership to be *prima facie* evidence of parent control over a subsidy. As a result, Dalmine had the burden of submitting evidence to Commerce rebutting this presumption. Dalmine failed to meet that burden.

The Court rejects Dalmine's assertion that while IRI legally controls a majority of Dalmine's shares, it exercises no effective production, marketing, or managerial control over Dalmine's operations. Dalmine Brief at 72. Although Dalmine claims that Dalmine S.p.A. operates as an independent, profit-maximizing corporation, without the financial assistance of IRI or any IRI-affiliated party, *id.*, the record does not contain substantial evidence to that effect.

In support of Dalmine's argument that it is independent, Dalmine cites to the verification report issued by ITC in the companion countervailing duty investigation of the subject merchandise. *See* Mem. from McGinty and Wilkniss to Kuhbach at 5, Annex K to Dalmine's Case Brief. The report states that "[w]e asked IRI officials how much discretion IRI exercises when presented with a subsidiary's business plan. Officials explained that IRI may make suggestions and may assist in and follow the activities of the subsidiary, but its involvement is limited to an advisory role." *Id.*

Dalmine's citation to the verification report issued by the ITC in the companion countervailing duty investigation does not rectify the failure of Dalmine to provide evidence during the administrative proceeding in the antidumping investigation that IRI had no such control over Dalmine's capital structure, production, selling, or management decisions. Dalmine failed to provide Commerce with substantial evidence on the record to necessitate a change in practice in this case. Further, because countervailing duty laws are directed at a different type of unfair trade practice than antidumping duty laws, an antidumping proceeding is not bound by findings in a countervailing duty proceeding. *See Aimcor, Alabama Silicon, Inc. v. United States*, 18 CIT 1117, 1123, 871 F. Supp. 447, 453 (1994).

B

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE IN SUPPORT OF DALMINE'S ASSERTION THAT IRI DOES NOT HAVE THE POWER TO DETERMINE DALMINE'S CAPITAL STRUCTURE

The Court rejects Dalmine's argument that because IRI allegedly did not have the capability of changing Dalmine's capital structure at will, Commerce acted unlawfully in resorting to IRI financial data. Dalmine

Brief at 74–75. The ITA has a "well-established practice of deriving net financing costs based on the borrowing experience of the consolidated group of companies * * *. [The ITA's] practice is based on the fact that the group's parent, primary operating company, or other controlling entity, because of its influential ownership interest, has the power to determine the capital structure of each member company within the group." Minivans, 57 Fed. Reg. at 21,946. Dalmine has interpreted this statement to mean that the majority equity owner must be able to change the capital structure of subsidiaries at will.

Dalmine's argument is flawed because Commerce does not require the parent company to be able to change the capital structure "at will". Rather, Commerce's policy is based on the rebuttable presumption that "majority equity ownership is prima facie evidence of corporate control." *Minivans*, 57 Fed. Reg. at 21,946.

Dalmine also argues that the ITA has focused on only the legal relationship between IRI and Dalmine even though there is an absence of any distortive financial transactions between them. Dalmine Reply at 46. This, according to Dalmine, is contrary to this Court's decision in *FAG Kugelfischer v. United States*, 932 F. Supp. 315 (CIT 1996). In *FAG Kugelfischer*, the Court found that the administrative record did not support ITA's decision to collapse the sales of two sister companies for purposes of calculating dumping margins. The Court observed that ITA:

> focused on "potential" rather than "actual" influence that [the sister companies' parent] may assert over its subsidiaries. This potential for influence absent consideration of other factors is not enough to create a strong possibility of price manipulation.

Id. at 324.

FAG Kugelfischer is inapposite here. In *FAG Kugelfischer*, Commerce collapsed the companies for purposes of calculating dumping margins because of its concern that "granting two related companies separate treatment creates an incentive to evade the dumping order by making U.S. sales through whichever company has a lower margin." *Id.* at 322. Those concerns are not at issue in this case. Here, Commerce is not dealing with sister companies. Instead, it is looking at the parent-subsidiary relationship. It is simply following its practice of considering Dalmine's ownership by IRI to be *prima facie* evidence of IRI's control. Dalmine failed to rebut Commerce's presumption that there is "actual" influence in this situation. Thus, Commerce's actions are affirmed.

3

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT BY USING IRI'S CONSOLIDATED INTEREST EXPENSE, COMMERCE IS DISTORTING DALMINE'S TRUE FINANCING EXPENSES

The Court rejects Dalmine's argument that by using IRI's consolidated interest expense, ITA is distorting Dalmine's true financing expenses. Dalmine Brief at 76. For the reasons discussed below, Commerce's decision is supported by substantial evidence on the record and is in accordance with law.

Commerce normally uses a parent company's consolidated financial statements even in cases involving consolidated groups whose member companies are involved in a wide variety of business activities. *Minivans*, 57 Fed. Reg. at 21,946. Thus, it is irrelevant that "IRI is a huge government-owned holding company, with equity interests in diverse operations." Dalmine's Case Brief at 56.

In addition, Commerce will allow respondents to "present[ ] evidence sufficient to show that the Department's practice of calculating interest expense based on the consolidated group of companies would result in any distortion of the true financing costs of [the subsidiaries'] operations." Minivans, 57 Fed. Reg. at 21,946. Thus, Commerce will change its practice of using a parent company's consolidated financial statement regardless of the activities of its member companies when presented with the appropriate information. Nothing in the record of this case indicates Dalmine gave Commerce any evidence that would have justified different treatment. The ITA's actions, then, are supported by substantial evidence on the record and in accordance with law.

A

THE ITA'S DECISION THAT DALMINE'S OWN CONSOLIDATED INTEREST EXPENSE DOES NOT REFLECT THE FULL FINANCING COST FOR THE SUBJECT MERCHANDISE IS REASONABLE

Dalmine argues that it is reasonable to conclude the consolidated interest expense reported in its financial statements is the full financing cost for the pipe in issue. The role of the Court, however, is to determine not the reasonableness of a party's position, but that of Commerce's method in reaching its position. *See Chevron*, *supra*. Here, Commerce's method is reasonable.

In conducting a COP/CV investigation, the ITA's goal is to calculate the full actual cost to produce the subject merchandise. *See* 19 U.S.C. § 1677b(b). Commerce based its calculations on the IRI consolidated expense. Although it might also be reasonable for Commerce to have based its calculations on Dalmine S.p.A.'s consolidated statements, the Court may only determine whether Commerce's method was a reasonable one. In view of the presumption that majority equity ownership of a subsidiary as *prima facie* evidence of corporate control, Commerce's use of IRI's consolidated expense is reasonable.

B

COMMERCE'S DECISION TO USE THE 1993 IRI CONSOLIDATED INTEREST EXPENSE IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IN ACCORDANCE WITH LAW

The Court rejects Dalmine's argument that Commerce should have used its 1994 audited consolidated interest expense because that is allegedly more probative information for production and sales during the POI than 1993 IRI consolidated interest. Dalmine Brief at 82. Unless contrary evidence is provided, the prior year is assumed to be reasonably representative of the company's normal experience. *See Furfuryl Alco-*

hol from Thailand, 60 Fed. Reg. 22,557, 22,561 (May 8, 1995). Commerce will use the prior-year consolidated financials when more current financials are unavailable so long as they reasonably reflect the current financial situation. *Certain Hot-Rolled Carbon Steel Flat Products*, 58 Fed. Reg. 37,125, 37,135 (July 9, 1993).

The POI was the first six months of 1994. Final Determination, 60 Fed. Reg. at 31,985. IRI's consolidated financial statements were not available at the date of verification, although Dalmine's 1994 consolidated financials, including the consolidated interest expense recorded therein, were available. Dalmine's Cost Verification Exh. A–12, AR Non Pub. Doc. 87, Fiche 89, Fr. 51. Commerce used IRI's audited consolidated financial statements from 1993 in accordance with its policy discussed above. Thus, Commerce's action is supported by substantial evidence on the record and in accordance with law.

H

THE ITA'S DECISION TO REDUCE IRI'S INTEREST EXPENSES BY SHORT-TERM INTEREST INCOME ONLY IS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AND IN ACCORDANCE WITH LAW

In calculating COP and CV, Commerce used a portion of IRI's financing expenses. *See* Final Determination, 60 Fed. Reg. at 31,990–91. Dalmine claims that IRI's financing costs should be offset with both short-term and long-term interest income. As discussed below, Commerce's action is supported by substantial evidence on the record and is in accordance with law.

1

BACKGROUND

In the Final Determination, Commerce stated:

> It is the Department's practice to allow a respondent to offset financial expenses with interest income earned from the general operations of the company. See, e.g., Timken v. United States, 852 F. Supp. 1040, 1048 (CIT 1994). The Department does not, however, offset interest expense with interest income earned on long-term investments because long-term interest income does not relate to current operations. See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany: Final Results of Antidumping Duty Administrative Review, 56 FR 31734 (July 11, 1991). * * * [W]e were able to determine the amount of short-term interest income for the consolidated IRI group * * * and have applied short-term interest income as an offset to Dalmine's financing costs.

Id. at 31,991.

2

THE ITA PROPERLY REDUCED IRI'S INTEREST EXPENSES BY SHORT-TERM INTEREST INCOME ONLY

The Court rejects Dalmine's argument that the ITA's interest policy improperly treats the same categories of interest expense and interest

income differently. Dalmine states that the ITA is claiming that all of a respondent's debt (that is, both long- and short-term borrowings) is used to fund a "company's current operations," but only its short-term investments are related to current operations for offset purposes. Dalmine Brief at 83. Dalmine argues that the ITA should treat interest paid and interest received by a company in the same manner. *Id.* at 83–84. Dalmine concludes that long-term debt "fund[s] the company's current operations," and long-term interest income must also be taken into account in calculating a respondent's net interest expense. *Id.* at 84.

Commerce allows respondents to submit proof that interest on long-term investments is related to current operations. The respondent needs to show Commerce that there is "a nexus between the reported interest income" and its "manufacturing operation". *NTN Bearing Corp. v. United States*, 905 F. Supp. 1083, 1097 (CIT 1995).

The record shows that Dalmine did not provide sufficient evidence to demonstrate the nexus to convince Commerce to use a different method. *See* Final Determination, 60 Fed. Reg. at 31,990–91. The Court rejects Dalmine's claim that companies may be unable to establish a nexus between its reported long-term interest income and its ordinary operations because money is generally considered to be fungible, regardless of where it is sourced or applied, Dalmine Reply at 53–54, as speculative. The Court affirms Commerce's treatment of IRI's interest expenses as supported by substantial evidence on the record and in accordance with law.

I

The ITA's Rejection As New Information Of Certain Documents That Dalmine Submitted With Their Reply Brief In Response To Quanex's Case Brief Was Reasonable

Commerce rejected two sets of documents attached to Dalmine's reply brief as new information and refused to consider them, but allowed Dalmine to submit a reply brief with the "new" information deleted from it. Dalmine argues that "due process and fairness required that they be given an opportunity to rebut new arguments advanced for the first time in [Quanex's] Case Brief." Dalmine Brief at 23–24. For the reasons that follow, Commerce's actions are upheld.

1

Background

Quanex argued in its administrative case brief that Dalmine had improperly excluded certain sales of alloy pipe made for boiler tube application that was stenciled to ASTM A–335 specification. Quanex's Case Brief of May 18, 1995 at 3–10, AR Pub. Doc. 241, Fiche 43, Fr. 1–49. Even though this pipe was used in applications which were excluded from the scope, Quanex submitted that the scope of the petition made clear that "all A–335 pipe, regardless of end use is included in the scope of this investigation. * * *" *Id.* at 4.

Dalmine attached to its reply brief two sets of documents which allegedly contradicted the "new" argument asserted by Quanex. Commerce required Dalmine to delete these documents and any references to them from its reply brief because they constituted "new information" under 19 C.F.R. § 353.31(a). Letter from the Director, Office of Antidumping Inves. to Rogers & Wells of May 30, 1995, AR Pub. Doc. 253, Fiche 49, Fr. 42. Dalmine's new version of its reply brief was in accordance with Commerce's instructions, and retained its rebuttal to Quanex's position with respect to scope. *See* Dalmine's Redacted Reply Brief, AR Pub. Doc. 255, Fiche 50, Fr. 1.

2

THE ITA PROPERLY REJECTED CERTAIN DOCUMENTS ATTACHED TO DALMINE'S REPLY BRIEF

This Court has recognized that foreign respondents have a right to due process in antidumping proceedings. *Sugiyama Chain Co., Ltd. v. United States*, 18 CIT 423, 436, 852 F. Supp. 1103, 1115 (1994). This right is limited by the lack of a Constitutional right to import merchandise into the United States or to engage in foreign trade. *See American Ass'n of Exporters and Importers v. United States*, 3 Fed. Cir. (T) 58, 71, 751 F.2d 1239, 1250 (1985) ("No one has a protectable interest to engage in international trade."). Consequently, parties simply have a right to the procedures set forth in the antidumping statute or in the agency regulations implementing that statute. *See Kemira Fibres Oy v. United States*, 18 CIT 687, 694, 858 F. Supp. 229, 235 (1994) ('judicial review of administrative determinations can only be meaningful under the due process clause of the Fifth Amendment if the reviews have been initiated in compliance with the procedures which Congress has set forth in statutes and which Commerce has implemented in its regulations.").

The regulation concerning the submission of factual information reads, in part:

> [S]ubmissions of factual information for the Secretary's consideration shall be submitted not later than:
> (i) For the Secretary's final determination, seven days before the scheduled date on which the verification is to commence; * * *.
> (3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reasons for the return of the information.

19 C.F.R. § 353.31(a)(1) and (3).

After the Preliminary Determination is issued, Commerce allows an interested party to submit a "case brief". This brief must "separately present in full all arguments that continue in the submitter's view to be relevant to the Secretary's final determination * * *, including any arguments presented before the date of publication of the preliminary determination * * *." 19 C.F.R. § 353.38(c)(1) and (2). An interested party may also submit a "rebuttal brief" separately presenting in full all re-

buttal arguments and "responding only to arguments raised in case briefs." 19 C.F.R. § 353.38(d).

In *Acciai Speciali Terni, S.p.A. v. United States*, Slip Op. 95–142, at 18 (Aug. 7, 1995), this Court did not require the ITC to provide any opportunity to rebut factual information submitted after the deadline for posthearing briefs even though the agency requested the information. Further, in *Timken Co. v. United States*, 12 CIT 955, 699 F. Supp. 300 (1988), the Court rejected a respondent's claim that it should have been given an opportunity to comment on a telex placed in the record eight days before publication of the final determination. The Court noted that the record contained many examples of respondent's involvement in the investigation which convinced the Court that respondent received adequate procedural rights. *Id.* at 966, 699 F. Supp. at 309.

Dalmine has received all the process that was due to it. The relevant regulation notifies the parties that Commerce will not consider untimely factual information. Commerce's policy of setting time limits on the submission of factual information is reasonable because Commerce "clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information." *Bowe-Passat v. United States*, 17 CIT 335, 339 (1993). There has been no unusual conduct by Commerce which deprived Dalmine of its due process rights. Indeed, Dalmine was permitted to submit a rebuttal brief in which Dalmine responded to Quanex's arguments. Consequently, the Court upholds Commerce's decision to reject as "new" the evidentiary material attached to Dalmine's rebuttal brief.

IV

CONCLUSION

For the foregoing reasons, this matter is remanded to Commerce with instructions that Commerce shall re-calculate the COP and CV with respect to DTI's galvanized products. Commerce's actions on all other issues contested in Dalmine's Motion For Judgment Upon The Agency Record are affirmed. Quanex's Motion For Judgment Upon The Agency Record is denied.

(Slip Op. 97–138)

NOVACOR CHEMICALS, INC. F/K/A POLYSTAR, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court Nos. 95–03–00279 and 95–05–00630

[Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied.]

(Dated September 25, 1997)

Sidney N. Weiss for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(James A. Curley)*, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Karen P. Binder*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on cross motions for summary judgment pursuant to USCIT Rules 56(a) and (b). Plaintiff, Novacor Chemicals, Inc. ("Novacor"), contends that it is entitled to interest on duty drawback erroneously held by the United States Customs Service ("Customs") for almost five years. The government argues that it does not have to pay interest on a return of drawback duties which it previously reclaimed.[1]

BACKGROUND

Novacor, formerly known as Polysar, Inc., imported shipments of styrene monomer from 1985 to 1987. Four of these shipments, entry numbers 564–0000049–5, 564–0000262–4, 564–0000264–0, and 564–0000265–7, are the subject of this matter. Novacor filed for accelerated drawback of duties on these entries pursuant to 19 U.S.C. § 1313 and received $456,557.00 from Customs. On January 29, 1988, Customs liquidated the relevant entries without benefit of drawback of duties and requested the accelerated payment back from Novacor. Novacor repaid the $456,557.00 to Customs on May 14, 1988. Novacor then filed a protest against the denial of drawback of duties within the statutory time limit.

Customs based its denial of drawback of duties on its opinion in C.S.D. 87–6, 21 Cust.Bull. 365, 366–67 (1987), which denied an importer drawback of duties on products that it did not own at time of reexport. This court, however, rejected 21 Cust. Bull. 365 in the test case of *Central Soya Co., Inc. v. United States*, 15 CIT 105, 111, 761 F. Supp. 133, 138 (1991). The court ruled that Customs' interpretation in 21 Cust.Bull.

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[1] **DRAWBACK:** The drawback may be (1) a repayment in whole or in part of customs duties paid on imported merchandise that is reexported (either in the same form as imported or manufactured into a more finished article) or (2) the refund upon the exportation of an article of a domestic tax to which it has been subjected. *Dictionary of Tariff Information* 271 (1924). *See* 19 U.S.C. § 1313 (1988); 19 C.F.R. § 191.2 (1987).

365 of who was entitled to drawback of duties for substitute same condition goods was contrary to congressional intent. *Central Soya*, 15 C.I.T. at 111, 761 F. Supp. at 138.

In accordance with *Central Soya*, Customs reviewed its decision regarding Novacor and reliquidated the entries. Customs decided on May 14, 1993, to refund to Novacor the $456,557.00.[2] Novacor again timely filed a protest on August 12, 1993, claiming that it was entitled to interest on the $456,557.00. Customs denied Novacor's protest on February 3, 1995.

These consolidated actions were filed in this court by Novacor in 1995 to review the denial of protest regarding Custom's failure to pay interest. Both sides have moved for summary judgment. There are no material facts in dispute.

STANDARD OF REVIEW

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. USCIT Rule 56(d).

DISCUSSION

I. The Tariff Act of 1930 in effect at the time of reliquidation in May 1993.

Novacor argues that the provisions of the Tariff Act of 1930 (codified as 19 U.S.C. §§ 1505(b)–(c) and 1520(d) (1988)), in effect before the Customs Modernization Act of 1993 ("the Act"), required Customs to pay interest on the return of drawback of duties. Novacor contends that the $456,557.00, which Customs forced it to repay and subsequently refunded after protest, qualifies as "increased or additional duties" as described in the statute.[3] Novacor filed for, and received, accelerated drawback treatment after it had paid the estimated duties on the entries. When Customs liquidated the entries, it decided that they did not qualify for drawback and billed Novacor for the amount that it had earli-

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[2] Customs claims in "Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute" that it only refunded $444,137.82. Customs did not explain why the parties state different amounts refunded.

[3] Section 1505, Title 19 of the United States Code provided (prior to the Customs Modernization Act of 1993):

> (b) Collection or refund
> The appropriate customs officer shall collect any increased or additional duties due or refund any excess of duties deposited as determined on a liquidation or reliquidation.
>
> (c) Duties due upon liquidation or reliquidation; delinquency; interest
> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(b)–(c) (1988).

Section 1520(d), Title 19 of the United States Code provided (prior to the Customs Modernization Act of 1993):

> (d) Interest rates; calculation
> If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as *increased or additional duties* under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

19 U.S.C. § 1520(d)(1988)(emphasis added).

er returned to plaintiff. Each bill contained the heading "supple duty," a phrase that both parties agree means "supplemental duty." Novacor argues that "supplemental duty" means "additional duties assessed upon liquidation or reliquidation."[4] Thus, plaintiff believes that upon liquidation, it was billed for, and paid, "additional duties" and must be paid interest on the refunded money pursuant to section 1520(d) (1988).

Plaintiff and defendant agree that under sections 1520(d) and 1505(c) (1988), if Customs decides upon reliquidation to return funds, it is authorized only to pay interest on "any amount paid as increased or additional duties." 19 U.S.C. § 1520(d) (1988). Thus, the issue before the court is whether a return of a reclaimed drawback of duties qualifies as "increased or additional duties."

"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986). Prior to 1984, Customs was immune from paying interest on any funds which it returned upon reliquidation. This was in contrast to importers, who were required to pay interest on all late payments. In 1984, Congress decided to make the playing field more even by enacting 19 U.S.C. § 1520(d). "[T]his legislation recognizes the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position in an appropriate forum." H.R. Rep. No. 98–1015, at 68 (1984), reprinted in 1984 U.S.C.C.A.N. 4960, 5027. The 1984 legislation, however, only authorizes Customs to pay interest on "increased or additional duties." 19 U.S.C. § 1520(d) (1988). "If any excess duties are being refunded, no interest is payable thereon." H.R. Rep. No. 98–1015, at 67. *See also Kalan, Inc. v. United States*, 944 F.2d 847 (Fed. Cir. 1991) (excess estimated duties were found not to qualify as "increased or additional duties").

Defendant cites the *Dictionary of Tariff Information* to demonstrate that the terms "increased duty" and "additional duty" have specific meanings, about which for decades there has been much litigation:

> *Increased duties.*—Increased duties are the differences between the estimated duties paid upon entry and any increase of regular duties in the liquidated duties as determined by the collector.
>
> *Additional duties.*—Additional duties are those which are assessed in addition to the regular duties accruing under the law.

Dictionary of Tariff Information 263 (1924). While such definitions do not have the same weight as a definition in a statute, they are supportive of the point that the phrases employed by Congress were not chosen to create an interest liability in all situations where Customs returns funds upon reliquidation. *See e.g. Kalan*, 944 F. 2d at 851–52. The defendant argues further that the statute specifically mentions "increased" and

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[4] 19 C.F.R. § 24.3a (1997) states:

(a) Due date of Customs bills. Customs bills for Supplemental duties (additional duties assessed upon liquidation or reliquidation) * * *

Id.

"additional" duties but does not mention "drawback," or "return of drawback" and thus, there is no "express congressional consent to allow an interest award." *Shaw*, 478 U.S. at 314. But this argument begs the question, i.e., whether increased or additional duties includes reclamation of drawback of duties.

Plaintiff argues that the funds withheld from it for almost five years were equivalent to "additional duties assessed upon liquidation" and should be returned with interest. Novacor bases its argument on the fact that upon liquidation, it was billed for "supple duty." Novacor argues that the definition of "supplemental duty" can be found in 19 C.F.R. § 24.3a(a) in the parenthetical phrase "additional duties assessed upon liquidation or reliquidation" appearing immediately after the words "supplemental duty." Customs contends that the parenthetical phrase, "additional duties assessed upon liquidation or reliquidation" is only an example of a supplemental duty. While general rules of language construction support the view that the parenthetical is the definition of the term which it follows, section 24.3a(a) itself is oddly written because it omits the term "increased duties" found in both the statute and 19 C.F.R. § 24.3a(b)(2).[5]

As has often been noted, the agency with responsibility to administer a statute has authority to interpret the statute, set policy and establish rules within the guidelines set by Congress. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). A similar rule applies to interpretation of an agency's own regulation. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). In this case, Customs' interpretation of 19 C.F.R. § 24.3a(a) that the definition of supplemental duty is only exemplary is within the bounds of a permissible construction of the regulation. The regulation, however, does not address in a definitive manner the issue of whether reclamation of duties drawn back qualifies as an "increased or additional duty" which would then qualify for an interest payment.[6]

The question is a statutory one, not a regulatory one. The duties drawn back are regular duties. *See* 19 U.S.C. § 1313 (1986). They are not "additional" duties in the sense of duties different from ordinary customs duties, e.g., countervailing or antidumping duties. Thus, the only remaining issue is whether the duties qualify in some other way as "increased or additional[7] duties."

Certainly in ordinary parlance the regular duties are increased over the duty amount paid during the period drawback of duties was allowed. Nothing in the statute limits the term "increased duties" according to

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[5] 19 C.F.R. § 24.3a(b)(2) provides:

Bills for supplemental duties. The due date for increased or additional duties, determined to be due upon a liquidation or reliquidation * * *

Id. (emphasis in original)

[6] The court does not find the affidavit of Robert B. Hamilton, submitted with defendant's reply brief, helpful on this point, as the affidavit erroneously avers that drawback does not "involve[ ] duties at all." *Contra* 19 C.F.R. § 191.2 (1987).

[7] Because the reclaimed drawback is an "increased duty", the court need not address whether a broad definition of "additional duties" is intended.

the particular reason for the increase. Accordingly, the court finds that 19 U.S.C. § 1520(d) and 19 U.S.C. § 1505(c) (1988) unambiguously provide for interest on any refund upon reliquidation of the increased portion of any regular duties. Duties once drawn back and then reclaimed upon liquidation by Customs constitute an increase in regular duties. Accordingly, interest is owed upon later refund.

For the sake of completeness and judicial economy, the court will address plaintiff's alternative claim, as if it had not prevailed on its primary theory.

II. The Tariff Act of 1930, as amended by the Customs Modernization Act of 1993 in effect as of December 8, 1993.

Novacor argues alternatively that Customs is required to pay interest on the returned drawback pursuant to the amendments to 19 U.S.C. § 1505(b) and (c) made by the Customs Modernization Act of 1993.[8] Novacor notes that the Customs Modernization Act became effective in December 1993, while the reliquidation without interest was under protest, and is still in effect. It argues, therefore, that the court should apply the law in effect at the time it makes its decision. Defendant, however, is persuasive in its argument that applying the 1993 amendments to entries which were reliquidated before the amendments became effective would constitute a retroactive application of the law, not in accordance with the intent of Congress.

Novacor points out that amended sections 1505(b) and (c) allow for importers to receive interest on refunded drawback of duties, even if the previous law did not. Whereas the previous law only allowed for interest payments on "increased and additional duties," the new sections require Customs to "refund *any excess moneys* deposited, together with interest thereon." 19 U.S.C. § 1505(b) (Supp. V 1993)(emphasis added). The provisions changed the law as interpreted in *Kalan*, 944 F.2d at 851, in which the court found that excess estimated duties did not qualify as "increased or additional duties." Congress broadened the basis for interest payments by using the broad term "excess moneys." *See* H.R. Rep. No. 103–361(I) at 140, *reprinted in* 1993 U.S.C.C.A.N. 2552, 2690 (provision enacted to "provide equity in the collection and refund of duties and taxes, together with interest").

Customs argues, however, that even if a refund of drawback must be made together with interest pursuant to the 1993 amendments, Congress did not intend for the interest provision to be applied retroactively.

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[8] Section 1505 Title 19 of the United States Code, as amended by the Customs Modernization Act of 1993, provides:

(b) *Collection or refund of duties, fees, and interest due upon liquidation or reliquidation*

* * * * * * * * *

Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

(c) *Interest*

Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. *Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation.*

19 U.S.C.A § 1505(b)–(c) (West Supp. 1997) (emphasis added).

Customs argues that only entries made after the effective date of the amendments (Dec. 8, 1993) qualify for the new treatment of interest. Customs claims that the triggering event for application of the law is entry and deposit of money, not liquidation or reliquidation.

In general retroactivity is not favored in the law, and, accordingly, legislation will be construed to operate only prospectively unless Congress has clearly expressed a contrary intention. *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 752 (Fed. Cir. 1997) (*citing Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 268 (1994)). In examining the application of section 1505(c) in *Travenol* the Federal Circuit outlined the relevant test. *Id.* "[T]he first issue is whether application of legislation to certain facts constitutes a retroactive application of that law. Only if the answer to that question is 'yes' must we search for a clear expression of congressional intent to apply the law retroactively." *Id.*

In *Travenol*, the plaintiff entered goods before the effective date of the Act, but the goods were reliquidated after. *Id.* at 751. The court found that the triggering event for the new legislation was not entry, as Customs argued, but liquidation (or reliquidation). *Id.* at 753. The court reasoned that importers only pay estimated duties at time of entry, and Customs does not determine whether there has been an underpayment or overpayment until it liquidates (or reliquidates) an entry and makes a final determination. *Id.* Until that time, both Customs and the importer are on notice that changes may occur. *Id.* Thus, in line with *McAndrews v. Fleet Bank of Mass.*, 989 F.2d 13, 16 (1st Cir. 1993) which stated "[t]he determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date," the Federal Circuit found that as liquidation (or reliquidation) is the triggering event for application of section 1505(c), there was no retroactive application in that case, and thus, the plaintiff was entitled to interest on repayments for entries made before, but liquidated after, the effective date. *Travenol*, 118 F.3d at 753.

Following the Federal Circuit's holding in *Travenol*, the application of section 1505(c) to the present case would be retroactive as reliquidation occurred in May 1993 and the effective date of amended section 1505(c) is December 8, 1993.

The next issue is whether there is a clear expression of congressional intent to apply the law retroactively. Novacor attempts to argue that there is clear congressional intent that the interest provision be applied to its entries. Novacor filed for drawback of duties under section 632(a)(6)(p) of the Act, codified as 19 U.S.C. § 1313(p), a provision allowing for substitution same condition drawback for finished petroleum derivatives (which cover Novacor's products). Although the effective date for the whole Act was December 8, 1993, section 632(b) of the Act provided for retroactive application of 19 U.S.C. § 1313(p). *See Nafta Imple-*

mentation Act, Pub. L. 103–182, § 632(b), 107 Stat 2197–98 (1993) (codified as 19 U.S.C. § 1313 note (1994).[9]

Novacor argues that because Congress provided for retroactive application for finished petroleum derivatives drawback, and it filed for drawback of duties pursuant to 19 U.S.C. § 1313, Congress intended for the interest provision in 19 U.S.C. § 1505(c) to be applied retroactively. As Customs notes, however, there is no clear Congressional intent to link the two provisions. While Congress intended to create a simpler system for allowing drawback of duties on petroleum derivatives which are stored in common storage facilities, *See* H.R. Rep. No. 103–361(I) at 129–30 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2679–80, Congress did not make any reference to the interest provision of section 1505(c). Congress specifically made certain provisions of the Act apply retroactively. If Congress intended for the interest provision to apply retroactively in certain cases, it would have so stated, just as it did for the petroleum drawback provision. Thus, this alternative basis for plaintiff's claim is rejected.

CONCLUSION

For the above reasons, plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied.

(Slip Op. 97–139)

VWP OF AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–12–00803

[Plaintiff challenges Customs' valuation of wool melton fabrics in which Customs based transaction value on the prices charged by VWP of America to its United States customers. *Held:* Customs correctly valued the melton wool fabrics on transaction value based on the sales of VWP of America to its U.S. customers.]

(Decided September 25, 1997)

Barnes, Richardson & Colburn (James S. O'Kelly, Alan Goggins and Matthew Goldstein) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Saul Davis)* for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff Victor Woollen Products of America ("VWPA") brings this action to contest the valuation made by the United

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[9] A note regarding the effective date of the 1993 amendment refers to Section 632(b) of Pub. L. 103–182 as providing: "Notwithstanding section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) or any other provision of law, the amendment * * * [amending subsection (p) of this section] shall apply to—

(1) claims filed or liquidated on or after January 1, 1988, and

(2) claims that are unliquidated, under protest, or in litigation on the date of the enactment of this Act [Dec. 8, 1993]."

19 U.S.C. § 1313 note (1994).

States Customs Service ("Customs") on imports of wool melton fabrics. Customs valued the subject merchandise based on the price paid by U.S. customers of VWPA. VWPA contends that the correct transaction value is the price between VWPA and its supplier and parent company Les Lainage Victor Ltée., or Victor Woollen Products, Ltd., of St. Victor de Beauce, Quebec, Canada ("VWPC"). The Court has jurisdiction over this action under 28 U.S.C. § 1581(a) and finds that Customs correctly valued the subject merchandise pursuant to 19 U.S.C. § 1401a(b) on the basis of VWPA's selling prices to its customers in the United States.

BACKGROUND

The subject merchandise is wool melton fabrics that are primarily used in the apparel industry for such articles as varsity jackets that have melton wool bodies with leather sleeves. The plaintiff, VWPA, imported the melton fabrics from the manufacturer and parent company in Canada, VWPC. VWPC sold melton fabrics directly to its U.S. customers prior to 1989 using a U.S. sales agent, Concept III. Prior to 1989, the terms of sale between VWPC and its U.S. customers was free on board ("FOB") at the Canadian factory. VWPA was activated as a Delaware corporation in November of 1989 to distribute the melton fabrics produced by VWPC to customers in the U.S., setting up a three-tiered transaction. At that time, sales contracts were begun directly between VWPA and the U.S. customers. The terms of sale to the U.S. customers remained FOB Canadian factory. In 1991, the terms of sale to U.S. customers were changed to FOB Jackman, Maine or other U.S. port of entry while the terms of sale between VWPC and VWPA remained FOB Canadian factory. Concept III remained the U.S. agent for VWPA sales in the U.S.

VWPA has no office, no warehouses, carries no inventory and has a single employee in the U.S. VWPA maintained its own financial records and all of the services that VWPC provided to VWPA were properly expensed to VWPA. VWPA paid U.S. income tax and it maintained a post office box and a bank account in Maine.

On the basis of concern that VWPC was avoiding import duties, as reported by one of VWPC's competitors in the U.S., Customs initiated an audit of the transactions between VWPC and VWPA in 1990. The result of this investigation was published in Customs HQ 544658, dated March 26, 1991, where Customs found that there were no *bona fide* sales between VWPC and VWPA. As a consequence, Customs valued the merchandise based on the sales price between VWPA and its U.S. customers. VWPA requested reconsideration after the change of terms of sale to FOB Jackman, Maine. Despite the change in the FOB point, all shipments continued to be made from Canada directly to the U.S. customer, not VWPA. Customs investigated the claim and issued HQ 544745 which held:

> (1) Under the facts presented, no *bona fide* sale occurred between [VWPC] and VWPA. Title passed directly from [VWPC] to the U.S. customer. The price actually paid or payable is the price the U.S. customer paid for the merchandise under transaction value.

(2) Under the terms presented, the sale for exportation for purposes of transaction value would be the sale between VWPA and the U.S. customer. Therefore, under transaction value, the price actually paid or payable for the merchandise is the price paid by the U.S. customer to VWPA.[1]

The subject entries made between November, 1992 and January, 1993, were appraised on the price charged by VWPA to its U.S. customer in accordance with Customs HQ 544745. VWPA claims that the correct transaction value is between VWPC and VWPA or, in the alternative, if transaction value cannot be determined, the appraisement of the subject entries should be based on deductive value.

STANDARD OF REVIEW

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."[2] However, recent decisions from the Court of Appeals for Federal Circuit ("CAFC") have ruled that the presumption of correctness applies solely to factual questions and that this Court's duty is to find the correct result. The duty of the Court to find the correct result in a valuation case stems from both legislative and judicial sources. The CAFC recently found that "the trial court * * * must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. * * * [T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Pursuant to the statute, "[i]f the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." 28 U.S.C. § 2643(b).[3] The Court reviews this case *de novo* in order to determine the questions of: (1) the influence of the related parties on sales price; (2) which transaction clearly marked the subject merchandise for export to the U.S.; and (3) the role of deductive and computed value calculations in determining the correct valuation of the merchandise.

DISCUSSION

The controversy centers around the interpretation and application of the valuation statute, 19 U.S.C. § 1401a. Customs and VWPA assert that the subject merchandise should be valued pursuant to transaction value as described in the statute.

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[1] Customs HQ 544745 at 8 (February 19, 1992).

[2] 28 U.S.C. § 2639(a)(1) (1994).

[3] *See Goodman Mfg., Inc. v. United States*, 13 Fed. Cir. (T) ___, ___, 69 F.3d 505, 508 (1995) (the statutory presumption of correctness attaches only to an agency's factual determinations) *and Rollerblade, Inc. v. United States*, 15 Fed. Cir. (T) ___, ___, Ct. No. 96-1397 at 6 (1997) (legal issues are not afforded deference under 28 U.S.C. § 2639 or under the administrative deference standard promulgated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

§ 1401a. Value

(a) Generally

(1) Except as otherwise specifically provided for in this chapter, imported merchandise shall be appraised, for the purposes of this chapter, on the basis of the following:

(A) The transaction value provided for under (b) of this section.

* * * * * * *

(b) Transaction value of the imported merchandise

(1) The transaction value of imported merchandise is the price actually paid or payable for the merchandise when sold for exportation to the United States, * * *

19 U.S.C. § 1401a (1988). Customs found that the sale between VWPA and its U.S. customers constituted the transaction that most directly caused exportation to the United States and Customs liquidated the merchandise based on the value of the price charged by VWPA to its U.S. customers. VWPA claims that the correct basis for transaction value is the sale between VWPC and VWPA claiming that this transaction actually precipitated the melton fabrics' importation.

I. TRANSACTION VALUE

The Court, subject to the statutory mandate, finds that the first inquiry in determining the value of the subject merchandise is to ascertain which transaction directly caused the importation into the U.S.; in other words, did the transaction between VWPC and VWPA or the transaction between VWPA and its U.S. customers effect the importation of the melton fabric. Embedded in this query is the determination of whether the transaction between VWPC and VWPA was at arm's length, *i.e.* was it a *bona fide* sale or did VWPA act as a mere agent of VWPC, rendering the sale between the parent and its subsidiary a fiction. VWPA contends that the test for *bona fide* sales is whether title and risk of loss passes from seller to buyer. Pl.'s Post Trial Br. at 9. The Court finds that the valuation statute clearly focuses on basing imported merchandise on the "price paid or payable." Risk of loss evaluation is not dispositive in a finding of *bona fide* sales since title passage between related parties does not effectively create a sale where control is still maintained by the parent over the subject merchandise. Further, the Court finds that there was no credible showing that risk of loss ever devolved upon the American subsidiary, VWPA. Mere passage of title may simply involve a paper transaction. The burden on VWPA is to prove that the purchase price of melton fabric from VWPC was negotiated at arm's length, reflecting terms bargained between unrelated parties.

VWPA asserts that Customs found two *bona fide* sales for exportation in HQ 544745, dated February 19, 1992. Pl.'s Post Trial Br. at 3. However, there can be no misinterpretation of the holding in HQ 544745, where Customs stated in no uncertain terms:

HOLDING:

(1) Under the facts presented, no *bona fide* sale occurred between [VWPC] and VWPA. Title passed directly from [VWPC]

> to the U.S. customer. The price actually paid or payable is the price the U.S. customer paid for the merchandise under transaction value.

The Court finds that Customs determined that only one sale, the sale between VWPC and it U.S. customers, was operative as a basis for valuation under the statute. Although Customs concedes in its Post Trial Brief that two *bona fide* sales occurred, the Court finds that Customs' interpretation of its own ruling is misplaced.[4] Customs mistakenly separates the mandate of the statute into two discrete requirements: (1) a finding of a *bona fide* sale; and (2) a sale that directly causes importation into the United States. The Court finds that no distinction exists in the statute; where there is a finding that the transaction is not a *bona fide* sale, that transaction certainly cannot be said to directly cause the importation. Simply put, transaction value cannot be based on a transaction that is found not to be a sale. In consonance with Customs HQ 544745, the Court, subject to the statute for transaction value, finds only one *bona fide* sale occurred, the sale between VWPC and its U.S. customers, which directly caused the importation of melton fabric into the U.S. for the reasons that follow.

II. Arm's Length Transactions and *Bona Fide* Sales

VWPA contends that *Nissho Iwai American Corp. v. United States*, 11 Fed. Cir. (T) ____, 982 F.2d 505 (1992) stands for the proposition that "where there is more than one sale for exportation transaction value should be based on the manufacturer's price to the middleman, and not the middleman's sale price." Pl.'s Post Trial Br. at 4. The court in *Nissho Iwai*, however, found that

> once it is determined that both the manufacturer's price and the middleman's price are ***statutorily viable*** transaction values, the rule is straightforward: the manufacturer's price, rather than the price from the middleman to the purchaser, is used as the basis for determining transaction value.

Nissho Iwai American Corp. v. United States, 11 Fed. Cir. (T) ____, ____, 982 F.2d 505, 509 (1992) (emphasis added). VWPA conveniently omitted the operative test at issue here: whether there was a statutorily viable transaction value between VWPC and VWPA.

Other courts have used a litany of factors in ascertaining arm's length transactions. When these factors are applied to the transaction between VWPC and VWPA it is clear that it was not concluded at arm's length. The Court first turns to the finding in *E.C. McAfee Co. v. United States*, 6 Fed. Cir. (T) 16, 842 F.2d 314 (1987) where the court cited an early precedential decision from its predecessor court in *United States v. Getz Bros. & Co.*, 55 CCPA 11 (1967). Even though the statute had been amended since *Getz*, the *McAfee* court found that the "language of the earlier stat-

[4] Customs argued in its brief that, "Customs stated that the transaction between [VWPC] and VWPA was a *bona fide* sale; however, Customs did not use that sale as the basis for TV [transaction value] because it treated that sale between VWPA and the United States customers as the sale that most directly caused the importation of the merchandise." Def.'s Post Trial Br. at 1.

ute is not significantly different from the quoted provision of the current statute,"[5] with respect to the determination of *bona fide* sales. In *Getz*, the court found that the test for value was whether the merchandise was "'freely sold' or 'offered for sale' to 'all those who cared to buy such goods in such market' in the ordinary course of trade." *United States v. Getz Bros. & Co.*, 55 CCPA 11, 21 (1967). Applying the requirements gleaned from *Getz*, the test is whether the melton fabric sold by VWPC to the U.S. market was "freely sold" or "offered for sale" to "all those who cared to buy such goods in [the U.S.] market" in the ordinary course of trade.

In order for U.S. customers to obtain the melton fabric produced by VWPC, purchases would have to be made with VWPA or its agent Concept III. The record confirms that there were no direct sales between VWPC and its U.S. purchasers of melton fabric. This fact has not only made comparisons with U.S. market prices impossible but it has also led the Court to find that the goods were not freely sold or offered for sale as contemplated by *Getz*. Any and all melton fabrics manufactured by VWPC that were purchased by customers in the U.S. were distributed by VWPA. Although exclusive sales agency does not automatically create a bar to a finding of arm's length sales transactions, the Court finds that the melton fabric was not freely sold or offered for sale to all of those who cared to buy it in the U.S. market in the ordinary course of trade.

In another case that utilized the export value statute, the court focused on the restrictions that the parent placed on the subsidiary as determinative of a finding of freely sold. *Chr. Bjelland & Co., Inc. v. United States*, 52 CCPA 38 (1965). In *Bjelland*, the court affirmed the appraised value of brisling sardines and kipper snacks, sold under the popular "King Oscar" brand, based on the actual selling price between the Norwegian parent and its U.S. wholly-owned subsidiary, Bjelland. The court in *Bjelland* examined a number of factors in determining whether sales were at arm's length; the factors included whether the purchasers: (1) buy the subject merchandise only from the exporter; (2) pay for the merchandise on delivery; (3) maintain warehouses; (4) guarantee their customers' stock against price decreases without help from the exporter; (5) furnish product liability insurance; (6) assume responsibility for returns; and (7) accept the prices dictated by the exporter without negotiation. *Id.* at 40. Applying these factors to the instant case, the Court finds that VWPA only bought merchandise from VWPC and was not required to pay for the melton fabric at the time of delivery.[6] VWPA did not maintain any warehouse space nor did VWPA guarantee their customers' stock against price increases since VWPA did not warehouse any merchandise. There was no showing that VWPA provided product liability insurance or accept responsibility for returns. Finally, VWPA accepted prices dictated by VWPC as evidenced by the fact that the U.S. customers paid the same price for the melton fabric both before and af-

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[5] *E.C. McAfee Co. v. United States*, 6 Fed. Cir. (T) 16, 842 F.2d 314, 318 (1987).

[6] "The transactions constituted classic sales on credit." Pl.'s Post Trial Br. at 9.

ter the incorporation of VWPA. All of these factors constitute a formidable showing that the transaction between VWPC and VWPA was not concluded at arm's length. Further, the Court notes that the application of the factors from *Bjelland* to the instant case can be a meaningless exercise when the evidence leads to the conclusion that VWPA is merely a U.S. agent or alter ego for VWPC. For example, due to the fact that VWPA and VWPC share the same directors and officers, it would be difficult to contemplate legitimate, bargained for price negotiations.

Finally, the Court turns to the findings in *Orbisphere Corp. v. United States*, 13 CIT 866, 726 F. Supp 1344 (1989), where the Court examined the relationship between a Swiss parent and its U.S. subsidiary. Orbisphere produced oxygen-sensing devices in Switzerland and sold them through its U.S. subsidiary to its U.S. customers. Orbisphere's U.S. subsidiary maintained four sales offices in the U.S. that would solicit orders and send them to the New Jersey office where they were forwarded to the Swiss plant for production. The Court found that the U.S. subsidiary bore the cost of insuring and risk of loss as well as meaningful passage of title, unlike the situation involved in the instant case. The Court also placed stock in the fact that the U.S. subsidiary employed personnel in four offices throughout the country indicating that the U.S. subsidiary was not a mere shell company.

In the instant case, VWPA employs only one person who works out of his house in New York, not the Jackman, Maine address, signifying that no considerable work is performed in the U.S. In *Orbisphere*, the Court also examined the fungibility of the subject merchandise and found that the orders placed by the U.S. customers were specific and the subject merchandise was not fungible. The importance of this fact is that the customers expected a specific product requiring that the U.S. sales offices spend substantial time in developing and pricing a particular article to suit the distinct needs of each customer. In contrast, the melton fabric at issue here is fungible in that the U.S. customers have no need for VWPA to perform any engineering or pricing functions. VWPA's U.S. customers all received the same melton wool fabric, albeit in different styles and amounts. The Court finds that these elements from *Orbisphere* lead to the conclusion that VWPA was merely a selling agent and alter ego of VWPC rendering the transaction between them incapable of being utilized as a basis for transaction value as it was not a *bona fide* sale negotiated at arm's length.

Applying the tests for *bona fide* sales for importation into the U.S. established in *Nissho Iwai*, *McAfee*, *Getz*, *Bjelland* and *Orbisphere* to the instant case, the Court finds that there was one *bona fide* sale, the sale between VWPC and its U.S. customers which directly caused the importation into the U.S. Because of the evidence regarding the nature of the relationship between VWPC and VWPA, the Court finds that the two companies are one and the same for purposes of administration of the import statutes implicated here. Therefore, the Court finds that the valuation of imported melton fabric is correctly based on the transaction

value of the sale between VWPA and its U.S. customers since VWPC effectively *is* VWPA.

VWPA cites *United States v. Massce & Co., et. al.*, 21 CCPA 54 (1933) and *Orbisphere Corp. v. United States*, 13 CIT 866, 726 F. Supp. 1344 (1989) for the proposition that the transaction between VWPA and its U.S. customers cannot qualify for transaction value since the sale is between two U.S. entities. Pl.'s Post Trial Br. at 17. Unlike the present situation, the court found two *bona fide* sales involved in the three-tiered transactions in both *Massce* and *Orbisphere*. The Court finds that VWPA is the alter ego of VWPC and as such, is a Canadian company in function with respect to the import statute. Therefore, the Court finds that the sale between VWPA and its U.S. customers is a sale between a Canadian company and U.S. customers which qualifies the sale for transaction value appraisal.

The Court recognizes that the standard for proving *bona fide* sales is high and the burden of proof weighs heavily on the related parties to prove arm's length negotiations. VWPA cites many factual similarities with the importer in another valuation case involving a three-tiered transaction, *J. L. Wood v. United States*, 62 CCPA 25, 505 F.2d 1400 (1974), where the court found two *bona fide* sales. Pl.'s Post Trial Br. at 6–8. The glaring difference between the two cases is that the parent company in *Wood* sold the subject merchandise to an unrelated third party in the U.S. at the same price while VWPC sold only to VWPA in the U.S. market. As the court in *Wood* stated:

> In this case, we have all necessary market evidence, since Carter, Ltd., sells for export to selected purchasers in the United States – Carter, Inc., and the OEMs. The price to the OEMs and to Carter, Inc., is the same. Because the OEMs are unrelated to Carter Ltd., or Carter, Inc., further proof of what price the merchandise is able to command in the market is not needed. We join the trial court in saying: "What better proof is there of the price fairly reflecting the market value when sales are made to other unrelated United States concerns at the same basic price."

J. L. Wood v. United States, 62 CCPA at 33, 505 F.2d at 1406. The same situation present in Wood was found in *Bjelland,* where the court found that same price sales to unrelated buyers provided the most reliable and incontrovertible proof of an arm's length transaction. VWPA has provided the Court with no such evidence and, in fact, there is overwhelming evidence that VWPA was simply incorporated to elude the substantial duties incurred by importing melton fabric. While the Court recognizes that the intent behind establishing corporations was to enable individuals to be protected from liability in order to promote business and economic growth, companies still must comply with the requirements of the "ordinary course of trade" with respect to the import statutes. The Court will look through the form to find the underlying function. If it is apparent that a subsidiary is merely an alter ego of the parent, the Court will not hesitate to disregard the constructive fiction.

III. Deductive and Computed Value

VWPA argues that if the Court cannot find a representative transaction value, test values of similar merchandise, deductive or computed value may be used for import valuation purposes. Based on the lack of reliability of allocations and computations, the Court rejects VWPA's calculations of test values of similar merchandise, deductive value and computed value. 19 U.S.C. § 1401a(b)(2)(A)(iv) provides:

> 19 U.S.C. § 1401a(b)(2)(A) The transaction value of imported merchandise determined under paragraph (1) shall be the appraised value of that merchandise for purposes of this chapter only if–
>
> * * * * * * *
>
> (iv) the buyer and seller are not related, or the buyer and seller are related but the transaction value is acceptable, for purposes of this subsection, under subparagraph (B).
>
> (B) The transaction value between a related buyer and seller is acceptable for the purposes of this subsection if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or if the transaction value of the imported merchandise closely approximates–
>
> (i) the transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States; or
>
> (ii) the deductive value or computed value for identical merchandise or similar merchandise;
>
> but only if each value referred to in clause (i) or (ii) that is used for comparison relates to merchandise that was exported to the United States at or about the same time as the imported merchandise.

VWPA asserts that a comparison can be made between its melton fabric and similar merchandise sold from another Canadian melton fabric manufacturer to an unrelated U.S. customer. Pl.'s Post Trial Br. at 13. However, VWPA failed to provide a sufficient showing that expenses such as packing costs, sales commissions, assists, royalties and rebates were properly taken into account. Def.'s Post Trial Br. at 20. The Court finds that the information provided by VWPA on these unrelated parties is insufficient to form a reliable comparison.

VWPA also contends that the prices charged by VWPC to VWPA closely approximate both deductive and computed value. Pl.'s Post Trial Br. at 14–17. VWPA calculated deductive and computed values based on audited records from VWPA and the record shows that the allocations were in accordance with Canadian generally accepted accounting principles ("GAAP"). Further, VWPA asserts that Customs rejected the submitted value calculations because the allocations were not in accordance with accepted Customs methodology. The Court agrees with VWPA that there is no rigid or specific manner with which to construct deductive and computed values. *Merck, Sharp & Dohme, Int'l v. United States*, 20 CIT ___, ___, 915 F. Supp. 405, 408 (1996). However, the Court must be

satisfied that the computations are reasonably accurate before they are accepted.

In Customs' audit report of June 16, 1992, it was determined that a number of figures that VWPA used in its comparison values, which mirror the comparisons presented at trial, were suspect. Specifically, in the shipments that Customs examined, VWPA did not include advertising expenses in its allocation of costs that could have been seen by its U.S. customers and were applicable to other shipments to the U.S. market. Customs Audit at 9. In addition, indirect labor and general expense rates were allocated to the price charged to VWPA at a lower rate for melton fabrics compared to VWPC's upholstery product line. *Id.* VWPA explained that these expenses were related to the upholstery line to a much greater extent. VWPA also used general and administrative expense figures that were based on estimated sales and not actual sales for the shipments that were audited resulting in a significant reduction in cost per yard of melton fabric. *Id.* The Customs audit also revealed that VWPA reduced the melton fabric cost charged from VWPC due to financial advantages and volume discounts. *Id.* VWPA contends that the financial advantages were a product of hedging on currency fluctuations which were subtracted from the fabric cost in accordance with GAAP. *Id.* at 10. However, Customs concluded that the calculations on these financial advantages, according to GAAP, were incorrect and that VWPA neglected to include the interest charged on the hedge. *Id.* Customs also found that the volume discount was based on a suspect bulk purchase order issued in anticipation of future small volume orders from U.S. customers. *Id.* Finally, Customs found that the profit rate of VWPA was four times higher than the profit rate of VWPC despite the fact that VWPC manufactured the melton fabric and VWPA had no significant physical presence in the U.S. *Id.* at 11.

The Customs audit, while providing only one facet of the circumstances surrounding the transactions between VWPC and VWPA, reveals that value comparisons using allocations of costs verified and in compliance with GAAP do not necessarily provide the Court with accurate information with respect to the import statute in the U.S. The Court finds that the record is replete with suspect figures and inconsistent allocations of costs. For these reasons, the Court finds that the deductive and computed values that VWPA submitted do not provide reliable comparisons to transaction value and are not acceptable. The Court rejects VWPA's deductive and computed values because of their lack of reliability, not their form.

CONCLUSION

For the foregoing reasons, the Court finds that the subject entries of melton fabrics is correctly valued on the price between VWPA and its customers in the United States.

(Slip Op. 97–140)

TORRINGTON CO., PLAINTIFF AND DEFENDANT-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NMB THAI LTD., PELMEC THAI LTD., NMB HI-TECH BEARINGS LTD., AND NMB CORP., DEFENDANT-INTERVENORS AND PLAINTIFFS

Consolidated Court No. 95–03–00353

(Dated September 26, 1997)

JUDGMENT

TSOUCALAS, *Senior Judge:* On June 23, 1997, this Court remanded to the Department of Commerce, International Trade Administration ("Commerce"), several issues arising from the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900 (Feb. 28, 1995). *See Torrington Co. v. United States*, 21 CIT _____, 969 F. Supp. 1332 (1997).

In particular, the Court ordered Commerce to: (1) recompute NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation's (collectively "NMB") cost of production and constructed value after allocating Minebea Japan's research and development expenses over its total consolidated cost of sales; and (2) correct the clerical error resulting in the double-counting of NMB's packing expenses.

On September 11, 1997, Commerce, in compliance with this Court's remand order, filed its *Final Results of Redetermination Pursuant to Court Remand, The Torrington Co. v. United States, Consol. Court No. 95–03–00353, Slip Op. 97–81 (June 23, 1997)* ("Remand Results"), with this Court. Commerce having complied with this Court's remand order, it is hereby

ORDERED that the Remand Results are affirmed in their entirety; and, all other issues having been previously decided, it is further

ORDERED that this case is dismissed.

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